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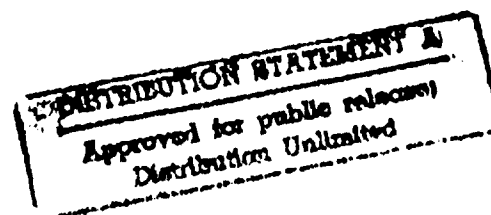
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THE INTERNATIONAL DOLPHIN CONSERVATION ACT OF 1992:  
UNREASONABLE EXTENSION OF U.S. JURISDICTION IN THE  
EASTERN TROPICAL PACIFIC OCEAN (ETP) FISHERY

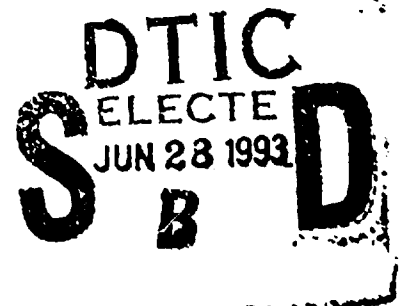
by

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**THE INTERNATIONAL DOLPHIN CONSERVATION ACT OF 1992:  
UNREASONABLE EXTENSION OF U.S. JURISDICTION IN THE  
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**I. INTRODUCTION: Dolphin mortality in the ETP<sup>1</sup>**

Since the early 1960's, one of the most controversial and emotional wildlife issues addressed by Congress has been the dispute over incidental dolphin mortality<sup>2</sup> in the ETP tuna fishery.<sup>3</sup> For reasons that are not entirely clear, dolphins and schools of yellowfin tuna frequently associate in the ETP.<sup>4</sup> Because dolphins are easy to spot as they swim along the ocean's surface, tuna fishermen have traditionally relied on the tuna-dolphin bond to locate large schools of yellowfin tuna.<sup>5</sup> Prior to 1959, this technique of locating tuna did not pose a serious threat to dolphins because the primary commercial method used to harvest yellowfin tuna was the "line-and-pole."<sup>6</sup> The threat to dolphins increased dramatically in 1959, however, with the introduction of purse seine nets to the ETP tuna fishery. This new technology

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<sup>1</sup>The Eastern Tropical Pacific (ETP) is a 7 million square mile area of the Pacific Ocean "bounded by 40° N. latitude, 40° S. latitude, 160° W. longitude, and the coastlines of North, Central and South America." 50 C.F.R. 8216.3 (1991).

<sup>2</sup>Incidental dolphin mortality is caused primarily by the use of purse-seine nets to fish for yellowfin tuna in the ETP and the use of driftnets to fish for tuna in other fisheries. INVESTIGATIVE REPORT, TUNA: CURRENT ISSUES AFFECTING THE U.S. INDUSTRY, REPORT TO THE SENATE COMMITTEE ON FINANCE, U.S. INT'L TRADE COMM'N PUB. No. 2547 (Aug. 1992). This paper will only discuss dolphin mortality associated with purse seine fishing in the ETP.

<sup>3</sup>*Id.*; 138 CONG. REC. H9064-02, H9067 (1992).

<sup>4</sup>Because yellowfin tuna and certain species of dolphins share a similar diet, one theory suggests that the bond is related to feeding. U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>5</sup>56 Fed. Reg. 4981 (1991).

<sup>6</sup>This method of fishing relies primarily on the use of hooks to catch tuna. After locating a school of fish, ground bait is thrown over the side to attract the tuna towards the vessel. As the tuna begin to feed on the baitfish, unbaited hooks are thrown into the water. Lacking the intelligence and built-in sonar of the dolphin, the tuna bite anything in the water, including the unbaited hooks. The dolphins, on the other hand, eat only the baitfish. 45 Fed. Reg. 72178 (1980); Conner, *The Conversion of Starkist*, *The San Francisco Chronicle*, Jun. 17, 1990; K. Holland, *Exploitation on Porpoise: The Use of Purse Seine Nets by Commercial Tuna Fishermen in the Eastern Tropical Pacific Ocean*, 17 SYRACUSE J. INT'L L. & COM. 267 (1991).

proved to be ten times more productive in catching tuna than the "line-and-pole" method.<sup>7</sup> However, it also brought with it an unwelcomed and serious rise in incidental dolphin mortality.<sup>8</sup> It is estimated that, since 1959, approximately 7.5 million dolphins have died in purse seine-related deaths in the ETP<sup>9</sup>. The majority of those deaths, approximately 6.8 million, were caused by the U.S. tuna fleet during the 1960's and 1970's.<sup>10</sup>

Public outrage in the U.S. over the high level of dolphin mortality in the ETP prompted a massive legislative effort to reduce the number of dolphin deaths associated with the domestic and foreign tuna fleets. The result was the Marine Mammal Protection Act (MMPA) of 1972.<sup>11</sup> The immediate goal of the Act was to reduce "the incidental kill or ... serious injury of marine mammals permitted in the course of commercial fishing operations ... to insignificant levels approaching ..." zero.<sup>12</sup> Continued concern over U.S. and foreign commercial fishing practices resulted in amendments to the MMPA in

<sup>7</sup>Conner, *supra* note 6.

<sup>8</sup>Purse seine fishing involves the use of deep-walled, nylon webbed nets, some of which reach depths of over 500 fathoms. After the nets are placed in the ocean, dolphins are herded into the area using helicopters, speed boats and Class C explosives. The dolphins are then intentionally encircled with the nets. The bottom of the nets are then winched closed by steel cables to prevent the tuna from escaping to deeper water. As a result, a number of dolphins are also trapped within the net. The walls of the "purse" are then tightened and a second net is used to remove the tuna from the water. However, before hauling the tuna onboard, efforts are made to release any dolphins that remain within the "purse". Notwithstanding these efforts, some animals inevitably become entangled in the nets and drown. Others are injured in the process and subsequently die from their injuries or are killed by sharks. K. Holland, *supra* note 6; J. Brooke, *10 Nations Reach Accord on Saving Dolphins*, *The New York Times*, May 12, 1992, at C4, col. 1; 138 Cong. Rec. H9064-02, H9070 (1992); U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>9</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2, at Table 3-1.

<sup>10</sup>*Id.*

<sup>11</sup>16 U.S.C. §§1361 et seq. (1992). Note that the MMPA is not limited to the protection of dolphins, but rather protects all forms of marine mammals.

<sup>12</sup>16 U.S.C. §1371(a)(2) (1992).

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1981, 1984 and 1988 to afford marine mammals further protections under the Act.<sup>13</sup>

Despite the progress made under the MMPA to reduce dolphin mortality, public dissatisfaction in the U.S. with the continued killing of dolphins resulted in consumer boycotts against canned tuna products. In response, the three major U.S. tuna processors- Starkist, Van Camp-Chicken of the Sea, and Bumblebee- announced in April 1990 that they would only sell dolphin-safe tuna in the U.S.<sup>14</sup> Congress built on this voluntary "dolphin-safe" policy by passing the Dolphin Protection Consumer Information Act (DPCIA) of 1990. The DPCIA established national labelling standards for dolphin-safe tuna.<sup>15</sup> Subsequently, court-ordered tuna embargoes were imposed between 1990 and 1992 against harvesting and intermediary nations that had failed to comply with the comparability standards of the MMPA.<sup>16</sup> The net effect of the MMPA, the dolphin-safe policy, the DPCIA labelling scheme and the court-ordered embargoes has been a significant reduction in dolphin mortality, as well as the elimination of almost all dolphin-unsafe tuna from the U.S. market.<sup>17</sup>

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<sup>13</sup>Some of the new protection measures included: an annual kill quota of 20,500 dolphins for the U.S. tuna fleet (1981); potential tuna embargoes against nations that did not have a comparable dolphin conservation program (1984); performance standards for tuna boat captains to reduce dolphin mortality and a 100 percent observer program on U.S. tuna boats (1988). 16 U.S.C. 881361 et seq. (1992); 50 C.F.R. 8216.24 (1991).

<sup>14</sup>138 Cong. Rec. S17840-05, S17841 (1992).

<sup>15</sup>138 Cong. Rec. H9064-02, H9067 (1992); 16 U.S.C. 81385 (1992).

<sup>16</sup>*Earth Island Institute v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990); *Earth Island Institute v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991); *Earth Island Institute v. Mosbacher*, 785 F. Supp. 826 (N.D. Cal. 1992).

<sup>17</sup>Pre-MMPA dolphin mortality in the ETP peaked at 534,000 deaths in 1961. 57 Fed. Reg. 27010, Table 2 (1992). By 1991, dolphin mortality in the ETP had been reduced to approximately 25,000 deaths, only 1005 of which were caused by U.S. tuna boats. 138 Cong. Rec. H9064-02, H9070 (1992).

Unfortunately, the MMFA embargoes and DPCIA labelling scheme have caused friction with some of our closest allies and trading partners. Mexico, Venezuela and the European Community (EC) have each challenged the embargoes and labelling scheme as unfair trade practices before the General Agreement on Tariffs and Trade (GATT). In September 1991, a dispute panel reviewing the Mexican complaint found that the U.S. embargoes (but not the labelling scheme) was GATT-illegal.<sup>18</sup> Notwithstanding these disputes, a significant breakthrough occurred at the international level in April 1992. At a special meeting of the Inter-American Tropical Tuna Commission (IATTC), the ETF harvesting nations joined in a multilateral agreement that will reduce dolphin mortality from 19,500 in 1993 to less than 5,000 per year by 1999.<sup>19</sup>

Despite this noteworthy achievement by the IATTC, Congress elected to amend the MMFA and, in October 1992, the President signed into law the International Dolphin Conservation Act (IDCA) of 1992.<sup>20</sup> The IDCA establishes new standards for dolphin protection including, *inter alia*: a 5-year global moratorium on the use of purse seine nets to intentionally encircle dolphins in order to harvest tuna.<sup>21</sup> To encourage compliance with these new measures, the IDCA allows the Secretary of the Treasury to lift existing tuna embargoes for any state that agrees to abide by the moratorium.

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<sup>18</sup>The EC and Venezuelan complaints are pending review. 138 Cong. Rec. H9064-02, H9069 (1992).

<sup>19</sup>Inter-American Tropical Tuna Commission Agreement, June 1992 (La Jolla, California). The parties to the agreement are: Columbia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Spain, the U.S., Vanuatu, and Venezuela. IATTC Agreement, app. 1; U.S. INT'L TRADE COMM'N PUBLICATION 2547, *supra* note 2.

<sup>20</sup>Pub. L. No. 102-523 (1992).

<sup>21</sup>Other dolphin protection provisions of the IDCA include: an international research program to develop new fishing equipment and techniques that are dolphin-safe and a mandatory dolphin-safe tuna market for the U.S. by June 1994. *Id.*

If a nation subsequently fails to comply with its commitments under the IDCA, the Secretary can impose a more onerous embargo, not only against yellowfin tuna harvested in the ETP, but also against any fish and fish products produced by the noncomplying state.<sup>22</sup>

This new legislative attempt to further extend U.S. dolphin conservation efforts in the ETP raises several interesting jurisdictional questions. Does international law provide a basis of jurisdiction for such unilateral regulation of domestic and foreign fishing activities in the ETP? If such a basis exists, will the exercise of extraterritorial jurisdiction to regulate foreign fishing practices in the ETP nevertheless be inconsistent with the international legal system? More specifically, even if the U.S. is not precluded from applying its laws extraterritorially, are U.S. conservation interests outweighed by the political, economic, social and sovereignty concerns of the other ETP harvesting states?

This paper will answer these questions by examining the practical and legal implications of extending the IDCA extraterritorially. A brief historical overview of U.S. fishery management and ocean policy regarding highly migratory species will be provided as background information. Similarly, a review of domestic and international efforts to manage tuna stocks and protect dolphins in the ETP will be provided. The extraterritorial extension of U.S. jurisdiction under the IDCA will then be examined under the reasonableness test of the *Restatement (Third) of the Foreign Relations Law of the United States* §403 (1986). As will be demonstrated herein, a balancing of the interests involved weighs heavily against unilaterally extending the IDCA

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<sup>22</sup>*Id.*

beyond the U.S. exclusive economic zone (EEZ). A reasonable alternative to the IDCA will, therefore, be offered in conclusion.

## II. U.S. FISHERY MANAGEMENT: A Historical Overview

### A. The Truman Proclamation of 1945

On September 28, 1945, President Truman took the unprecedented step of unilaterally establishing fishery conservation zones over high seas areas contiguous to the U.S. coast<sup>23</sup>. In these zones, the U.S. was to exercise exclusive regulatory control over areas that had been traditionally fished by U.S. nationals alone. Areas traditionally used by both U.S. and foreign fishermen would be regulated by bilateral agreements. Additionally, the Proclamation recognized the right of other coastal states to establish similar conservation zones provided they were consistent with the U.S. claims.

Although the proclamations indicated that freedom of navigation would not be affected in the zones, the unintended result of this unilateral extension of jurisdiction was a new era of expansive maritime claims by the international community. Citing the Truman Proclamations as authority, Chile, Ecuador and Peru signed the Declaration of Santiago in 1952 and established 200 nautical mile maritime zones. In these zones, each nation claimed exclusive sovereign jurisdiction, not only over the resources in the zone, but also the water column.<sup>24</sup> Other nations soon followed suit with similar

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<sup>23</sup>Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas, Sep. 28, 1945, Presidential Proclamation No. 2668, 10 Fed. Reg. 12304 (1945). A second proclamation issued on the same day extended jurisdiction over the natural resources of the U.S. continental shelf. Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Sep. 28, 1945, Presidential Proclamation No. 2667, 3 C.F.R. 867 (1943-1948 Compilations).

<sup>24</sup>T. Clingan, Jr., *Emerging Law of the Sea: The Economic Zone Dilemma*, 14 SAN DIEGO L. REV. 530-547 (1977); E. Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFFAIRS 902-919 (1980).

declarations. The potential result of these claims was a serious threat to freedom of navigation and overflight in areas that had traditionally been considered part of the high seas.<sup>25</sup>

#### **B. Magnuson Fishery Conservation and Management Act of 1976**

Continued concern over depletion of coastal fish stocks prompted Congress to take further unilateral action to protect U.S. fishing interests beyond the territorial sea. With the enactment of the Magnuson Fishery Conservation and Management Act (MFCMA) of 1976, Congress established a broad 200-mile Fisheries Conservation Zone (FCZ) in which the U.S. claimed exclusive management authority over all fish stocks found in the zone, except highly migratory species.<sup>26</sup> With regard to highly migratory species, the MFCMA authorized the Secretary of State to initiate negotiations with other nations "for the purpose of entering into international fishery agreements ... [to] provide for the conservation and management ..." of such species throughout their range.<sup>27</sup>

Although well-intended, the MFCMA had an adverse impact on U.S. ocean policy goals. In the short-term, the timing of the Act preempted the

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<sup>25</sup>In effect, what these states were claiming was a 200-mile territorial sea. Such claims are significant because foreign vessels only enjoy a right of innocent passage through the territorial sea of another state. Additionally, a right of overflight does not exist in the airspace above the territorial sea. If all coastal states were to claim 200-mile territorial seas, freedom of navigation and overflight rights critical for U.S. military and commercial needs would be adversely affected.

<sup>26</sup>16 U.S.C. 881801 *et seq.* (1992). Highly migratory species, such as tuna, do not live in any defined area of water. Therefore, until 1990, the U.S. maintained that no state had a paramount interest in managing such stocks, even when found within a state's exclusive economic zone (EEZ). As discussed below, the U.S. amended the MFCMA in 1990 to place tuna found within the U.S. EEZ under exclusive U.S. management jurisdiction. U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>27</sup>16 U.S.C. 881812, 1822 (1992).



conclusion of a promising agreement with several Latin American states to multilaterally regulate tuna stocks in the ETP.<sup>28</sup> It additionally undercut U.S. efforts at the U.N. Conference on the Law of the Sea to obtain consensus on international standards for the conservation and management of highly migratory species.<sup>29</sup> In response to the MFCMA, several countries immediately extended their fishery jurisdictions out to 200-miles.<sup>30</sup> Unlike the MFCMA, however, many of these claims asserted jurisdiction over highly migratory species.<sup>31</sup> In the long-run, the MFCMA was relied on by a number of states to make more expansive maritime claims.<sup>32</sup> By 1990, 13 states claimed 200-mile territorial seas, 21 states claimed 200-mile fishery zones, and another 80 nations claimed 200-mile EEZs.<sup>33</sup> The MFCMA also demonstrated U.S. willingness (repeated in the IDCA) to enact fishery legislation inconsistent with its existing international treaty obligations. Arguably, the Act violated U.S. commitments under the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, the 1958 Geneva

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<sup>28</sup>J. Moore, *Foreign Policy and Fidelity to Law: The Anatomy of a Treaty Violation*, 70 ANEP. J. INT'L L. 802-808 (1976).

<sup>29</sup>J. Kindt, *Overall Goals for Protecting the Marine Environment*, 2 JOHN WARREN KINDT, MARINE POLLUTION AND THE LAW OF THE SEA 673, 675-708 (1986).

<sup>30</sup>These states included: Norway, Mexico, Canada, France, Guatemala, Japan, Spain, India, Sri Lanka, and Senegal. T. Clingan, Jr., *supra* note 24.

<sup>31</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>32</sup>J. Kindt, *supra* note 29. These claims were made despite language in the MFCMA which indicated that the traditional high seas freedoms of navigation and overflight would not be impeded in the ECZ. 16 U.S.C. §1601 (1992).

<sup>33</sup>Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, Naval Warfare Publication (NWP) 9 (Rev. A)/Fleet Marine Force Manual (FMRM) 1-10, of 5 October 1989, Table ST1-5.

Convention on the High Seas, and several bilateral and multilateral fishery agreements.<sup>34</sup>

### C. U.S. EEZ Proclamation of 1983

In July 1982, the U.S. eliminated any further hope of reaching international consensus on the issue of fishery management by declaring that it would not sign the 1982 U.N. Convention on the Law of the Sea (LOSC).<sup>35</sup> Less than a year later, however, the President announced that the non-seabed portions of the LOSC reflected customary international law and that the U.S. would accordingly exercise its maritime rights and duties consistent with those provisions.<sup>36</sup> He concurrently declared that the U.S. was establishing a 200-mile EEZ consistent with international law.<sup>37</sup>

For the most part, the U.S. EEZ Proclamation paralleled the EEZ concept established in Part V of the LOSC. Within this new zone, the U.S. claimed to exercise "sovereign rights for the purpose of ... exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters ...."<sup>38</sup> The MFCMA was amended

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<sup>34</sup>Geneva Convention on Fishing and Conservation of the Living Resources on the High Seas (1958), 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285, Articles 1, 7 and 9-12; Geneva Convention on the High Seas (1958), 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 83, Articles 2, 6 and 22; J. Moore, *supra* note 28.

<sup>35</sup>The primary justification given for this decision was that the deep seabed mining provisions of the Convention were contrary to U.S. interests. *Statement of United States Ocean Policy*, March 10, 1983, 1 PUB. PAPERS: RONALD REAGAN: 1983, at 378-379 (1984).

<sup>36</sup>*Id.*

<sup>37</sup>*Exclusive Economic Zone of the United States of America*, March 10, 1983 (Presidential Proclamation No. 5030), 1 PUB. PAPERS: RONALD REAGAN: 1983, at 380 (1984).

<sup>38</sup>Nothing in the Proclamation, however, was intended to interfere with the traditional high seas freedoms of navigation and overflight within the zone. *Id.*

accordingly to reflect that the U.S. would exercise "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources," within the EEZ.<sup>39</sup> Specifically excluded from both the EEZ Proclamation and the MFCMA amendments, however, was jurisdiction over highly migratory species.<sup>40</sup>

#### D. Fishery Conservation Amendments Act of 1990

U.S. fishery policy regarding highly migratory species was finally reversed with the enactment of the Fishery Conservation Amendments Act (FCAA) of 1990. Effective January 1, 1992, the MFCMA was amended to claim jurisdiction over tuna stocks found within the U.S. EEZ.<sup>41</sup> More importantly, the FCAA for the first time recognized the right of other coastal states to claim jurisdiction over tuna stocks found within their 200-mile EEZs or FZs.<sup>42</sup> This arguably includes the right to regulate how, and to what extent, tuna stocks will be harvested within these zones. The IDCA, however, imposes a moratorium on the use of purse seine nets to intentionally encircle dolphins. It therefore attempts to regulate how a foreign state may harvest tuna within its own EEZ. Such extraterritorial regulation is clearly

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<sup>39</sup>16 U.S.C. §§1801, 1811 (1992).

<sup>40</sup>The EEZ Proclamation explicitly rejected U.S. jurisdiction over marine mammals and tuna and recognized the need for international agreements to effectively manage these stocks. Presidential Proclamation No. 5030, *supra* note 37. The MFCMA similarly provided that the U.S. "shall cooperate directly or through appropriate international organizations with those nations involved in fisheries for highly migratory species with a view to ensuring conservation and promoting the objection of optimum utilization of such species throughout their range, both within and beyond the exclusive economic zone." 16 U.S.C. 81812 (1992).

<sup>41</sup>10 S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>42</sup>*Id.*

inconsistent with the FCAA's recognition of a coastal state's sovereign rights over tuna found within its EEZ.

### III. EARLY U.S. EFFORTS TO PROTECT MARINE MAMMALS

#### A. Marine Mammal Protection Act of 1972

Throughout much of the 1970's and 80's, Congress was also actively involved in extraterritorial efforts to reduce incidental marine mammal mortality caused by domestic and foreign commercial fishermen. Concern that certain species of marine mammals were being depleted "below their optimum sustainable population" prompted Congress to enact the MMFA of 1972.<sup>43</sup> The primary feature of the MMFA was "a moratorium on the taking and importation of marine mammals and marine mammal products...."<sup>44</sup> There were, of course, exceptions to the moratorium, including an exception for the incidental taking of marine mammals during commercial fishing operations.<sup>45</sup> Under this exception, "the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna ..." was permissible as long as commercial fishermen were using "the best marine mammal safety techniques and equipment..." that were economically and technologically practicable.<sup>46</sup>

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<sup>43</sup>45 Fed. Reg. 72178 (1980); 16 U.S.C. 81361 (1992). "Optimum sustainable population" is defined as "a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity." 50 C.F.R. 8216.3 (1991); "Maximum net productivity" is defined as "the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality." 50 C.F.R. 8216.3 (1991).

<sup>44</sup>The immediate goal of the Act was to reduce "the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations ... to insignificant levels approaching zero ...." 16 U.S.C. 1371a (2) (1992).

<sup>45</sup>Id.

<sup>46</sup>Id.

Notwithstanding the enactment of the MMPA, more than 1.3 million dolphins died in the ETP tuna fishery between 1972 and 1980 as a direct result of intentional encirclement by purse seine nets. Dissatisfied with these and other marine mammal mortality figures, Congress amended the MMPA in 1981 by imposing an annual kill quota of 20,500 dolphins on the U.S. tuna fleet.<sup>47</sup> As a result, U.S.-caused dolphin mortality dropped dramatically throughout the 1980's, reaching a record low of 1005 animals in 1991.<sup>48</sup> During this same time period, however, dolphin mortality caused by foreign tuna fleets increased.<sup>49</sup>

Concern over lax foreign fishing practices resulted in additional amendments to the MMPA in 1984 and 1988. Included in these amendments was an import ban on yellowfin tuna harvested in the ETP by nations that did not have a dolphin conservation program comparable to that of the U.S. purse seine fleet. Tuna imports could also be banned from such nations if their average dolphin mortality rates exceeded U.S. standards.<sup>50</sup> In addition to the possibility of a primary embargo, the MMPA amendments also prevented "tuna laundering" by requiring intermediary nations that exported yellowfin tuna to the U.S. "to certify and provide reasonable proof..." that they had taken

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<sup>47</sup>C. Coulston, *Flipper Caught in the Net of Commerce: Reauthorization of the Marine Mammal Protection Act and Its Effect on Dolphins*, 11 J. ENERGY, NAT. RESOURCES & ENVTL. L. 97 (1990). See also 50 C.F.R. §216.24(d)(2)(i) (1991).

<sup>48</sup>138 Cong. Rec. H9064, at H9070 (1992).

<sup>49</sup>*Id.*, at H9071.

<sup>50</sup>Comparability standards are set out in detail in 16 U.S.C. §1371(a)(2)(B) and 50 C.F.R. §216.24 (1991). For purposes of a primary embargo, a harvesting nation is defined as "the country under whose flag ... fishing vessels are documented, or which has by formal declaration agreed to assert jurisdiction over ... certified charter vessels, from which vessel(s) fish are caught that are a part of any cargo or shipment of fish to be imported into the United States ...." 50 C.F.R. §216.3 (1991).

measures "to prohibit the importation of such tuna..." from harvesting nations subject to a primary embargo.<sup>51</sup> Failure to provide the required proof would result in a secondary embargo against the noncomplying state.<sup>52</sup> If these embargoes failed to achieve their intended results, a further ban on any other fish or fish product was authorized pursuant to the Fisherman's Protective Act of 1967.<sup>53</sup> The 1988 Amendments additionally established performance standards for tuna boat captains and required the use of dolphin-friendly fishing technology.<sup>54</sup> To monitor compliance with these added safeguards, the amendments instituted a 100 percent observer program for the U.S. tuna fleet.<sup>55</sup> Similarly, foreign nations wishing to export yellowfin tuna harvested in the ETF to the U.S. had to implement an observer program to meet the MMPA comparability standards.<sup>56</sup>

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<sup>51</sup>138 Cong. Rec. E2774-02 (1992); 16 U.S.C. §1371. An intermediary nation is defined as "a nation which exports yellowfin tuna or tuna products to the United States and which imports yellowfin tuna or tuna products." 50 C.F.R. §216.3 (1991).

<sup>52</sup>138 Cong. Rec. E2774-02 (1992); 16 U.S.C. §1371 (1992).

<sup>53</sup>The Pelly Amendment [22 U.S.C. §1978 (1988)] to the Fisherman's Protective Act authorizes the President to ban the importation of any fish or fish product "from a nation that diminishes the effectiveness of an international fishery conservation program ...." 134 Cong. Rec. S16336, S16343 (1988).

<sup>54</sup>Performance standards and vessel gear requirements are contained in 16 U.S.C. §1374 (1992) and 50 C.F.R. §216.24(d)(2) (1991). Some of the more important performance standards include: a ban on sundown sets; a requirement to engage in a "backdown" procedure to release dolphins trapped in the net; and a prohibition on the use of Class C explosives to herd dolphins into the net. Gear requirements include: porpoise safety panel (i.e., Medina Panel); porpoise apron; porpoise safety panel markers, hand holds, and corkline hangings; bunchlines; speedboats; rubber raft; facemasks and snorkels; and spotlights.

<sup>55</sup>138 Cong. Rec. S12946 (1988); 16 U.S.C. §1374 (1992); 50 C.F.R. §216.24(d)(2) (1992).

<sup>56</sup>A foreign nation had to demonstrate that its tuna fleet was being "monitoring by observers from the IATTC or an equivalent international program" in which the U.S. participated, and that the level of observer coverage was equal to that imposed on U.S. vessels "unless an alternative observer program [was] ... determined to provide sufficiently reliable documentary evidence of the nation's incidental take rate." 54 Fed. Reg. 20171 (1989); 16 U.S.C. §1374 (1992).

## 1. Reaction to Tuna Embargoes Under the GATT

Beginning in 1990, court-ordered embargoes were imposed against various harvesting nations that did not have comparable dolphin conservation programs or had exceeded U.S. standards regarding average dolphin mortality rates. Subsequently, embargoes were ordered against various intermediary nations that failed to demonstrate that they had banned yellowfin tuna products from nations subject to the primary embargoes.<sup>57</sup>

In January 1991, Mexico requested the GATT Council to establish a panel to consider whether the primary and secondary embargo provisions of the MMFA and the labeling provisions of the DPCIA were GATT-illegal.<sup>58</sup> Mexican officials argued that the embargoes violated:

- (1) the prohibition on quantitative restrictions under GATT Article XI;
- (2) ... the prohibitions on discriminatory administration of quantitative restrictions under GATT Article XIII ...; and (3) ... the requirement to accord national treatment to imported goods under GATT Article III.<sup>59</sup>

Mexico additionally challenged the application the DPCIA labeling provisions to Mexican tuna.<sup>60</sup> U.S. officials responded that the embargo provisions were "internal regulations permitted under GATT Article III(4) ..." and the

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<sup>57</sup>*Earth Island Institute v. Mosbacher*, *supra* note 16. Fourteen nations remain subject to these embargoes. U.S. Dept. of State Dispatch, Aug. 24, 1992, *Statement before the Senate Committee on Commerce, Science, and Transportation*, Washington, D.C., Jul. 23, 1992 (statement by David A. Colson, Deputy Assistant Secretary for Oceans and Fisheries Affairs); 58 Fed. Reg. 3013 (1993).

<sup>58</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>59</sup>J. Trachtman, *United States -- Restrictions on Imports of Tuna*, 86 AM. J. INT'L L. 142 (Jan. 1992).

<sup>60</sup>Mexico also challenged the potential application of a Pelly Amendment embargo against other fish products from Mexico. *Id.*, at 143.

Note Ad Article III, "and were therefore not subject to Articles XI and XIII."<sup>61</sup> In the alternative, U.S. authorities argued that the embargoes were permitted exceptions to protect animal life and conserve exhaustible natural resources under Article XX(b) and XX(g).<sup>62</sup>

The dispute panel found that Article III and the Note Ad Article III were limited to the regulation of products as such (*i.e.*, the tuna). The MMPA, however, attempted to regulate the production process of the product (*i.e.*, the harvesting of tuna) and not the product itself. The panel therefore concluded that the MMPA embargoes could not be justified as internal regulations applied at the point of importation under Article III. With regard to Article XX(b), the dispute panel found that the embargoes were not necessary because the U.S. had failed to exhaust "all options consistent with the GATT .... such as international negotiation and cooperation ...., before using GATT-inconsistent measures ...."<sup>63</sup> More importantly, the panel limited the use of Article XX(b) to domestic animal protection. The panel

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<sup>61</sup>*Id.*, at 142-143. Under Article III(1) national regulations may not be applied "to imported or domestic products so as to afford protection to domestic production." Under Article III(4), foreign products must be accorded "treatment no less favorable than that accorded to like products of national origin in respect of all laws ... affecting their internal sale ..., distribution or use." The Note Ad Article III provides that "any law ... which applies to an imported product and the like domestic product and is ... enforced in the case of the imported product at the time or point of importation, is ... subject to the provisions of Article III." Article XI(1) provides that "no prohibitions ... shall be instituted ... by any ... party on the importation of any product of the territory of any other ... party ...." General Agreement on Tariffs and Trade (1947), 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

<sup>62</sup>J. Trachtman, *supra* note 59, at 143. Article XX provides that "Subject to the requirement that such measures are not applied in a manner which would constitute means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... (b) necessary to protect human, animal or plant life or health; ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." GATT, Article XX, *supra* note 61.

<sup>63</sup>J. Trachtman, *supra* note 59, at 148.



specifically found that Article XX(b) did not "except measures from the restriction of the GATT that are intended ... to protect foreign animals ...."<sup>64</sup> It similarly restricted the application of Article XX(g) by finding that conservation measures adopted pursuant to Article XX(g) were permissible only to the extent that they primarily restricted production or consumption within a state's jurisdiction.<sup>65</sup> Having determined that the Article XX exceptions did not apply, the panel found that the primary and secondary embargoes were inconsistent with Article XI(1).<sup>66</sup> The DFCIA labelling provisions, on the other hand, were found to be consistent with GATT Article I(1). The panel held that the labelling provision did not restrict the sale of tuna. Rather, tuna products could be sold with or without the "Dolphin Safe" label.<sup>67</sup>

Following the hearing, the dispute panel recommended that the GATT Council request the U.S. to bring the MMPA and its application into compliance with the GATT.<sup>68</sup> Final action on the panel report was withheld, however, after the U.S. and Mexico reached a tentative compromise whereby Mexico agreed not to request the GATT Council to adopt the report until after the two nations had attempted to work out a settlement.<sup>69</sup> Despite Mexico's

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<sup>64</sup>*Id.*, at 149.

<sup>65</sup>*Id.*

<sup>66</sup>In light of this ruling, the complaint was not reviewed under Article XIII. *Id.*, at 143 and 147.

<sup>67</sup>The challenge to the Pelly Amendment was also denied on the grounds that the U.S. law allows for the discretionary, not the mandatory, imposition of an embargo. T. Schoenbaum, *Agora: Trade and Environment: Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AMER. J. INT'L L. 700 (1992).

<sup>68</sup>*Id.*, at 143.

<sup>69</sup>U.S. INT'L TRADE COMM'N PUB. No 2547, *supra* note 2.

reluctance to enforce the panel's report, two additional complaints have been filed challenging the MMPA embargo provisions under the GATT. On July 14, 1992, the EC requested that a second dispute panel be established to review the secondary import bans currently in force against Spain, France, Italy, and the United Kingdom.<sup>70</sup> Venezuela has also threatened to bring a similar action if the MMPA embargo is not lifted.<sup>71</sup>

### B. Dolphin-Safe Policy and the DPCIA

While the aforementioned court actions were ongoing, environmental groups in the U.S. were busy organizing consumer boycotts against canned tuna to protest dolphin-unsafe fishing practices.<sup>72</sup> In response to the growing public relations problem created by these boycotts, the three principal U.S. tuna processors- Starkist, Van Camp-Chicken of the Sea, and Bumblebee- announced in April 1990 that they would only purchase dolphin-safe tuna for the U.S. market.<sup>73</sup> This unexpected announcement had an immediate and substantial effect on both the domestic and foreign tuna industries. To avoid losing their share of the largest canned tuna market in the world, a number of foreign tuna processors, including Mitsubishi Foods,<sup>74</sup> were forced to adopt a similar policy.<sup>75</sup> Domestically, the U.S. purse seine fleet was forced to

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<sup>70</sup>U.S. Dept. of State Dispatch, *supra* note 57.

<sup>71</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2, at n.80.

<sup>72</sup>*Id.*

<sup>73</sup>56 Fed. Reg. 47418 (1991).

<sup>74</sup>Mitsubishi packages Three Diamonds brand and A&P's and Safeways' store brands. A. Manning, *The Net Effect on Dolphins*, USA Today (final ed.) Aug. 6, 1990.

<sup>75</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

restructure and transferred most of its fishing operations to the Western Tropical Pacific (WTP) where the tuna-dolphin bond does not occur.<sup>76</sup>

Whereas the U.S. fleet had once dominated the ETP tuna fishery during the 1970's and 80's (reaching a high of 112 vessels in 1976), by 1992, the number of U.S.-flagged purse seiners in the ETP had dropped to seven.<sup>77</sup>

Congress also responded to the canners' announcement by enacting the DPCIA of 1991.<sup>78</sup> The Act defines "dolphin safe" and makes it unlawful for a tuna producer, offering to sell tuna products in the U.S., to misuse a label suggesting that a product is "dolphin safe".<sup>79</sup> Specifically, it is a violation of Section 5 of the Federal Trade Commission Act to affix a dolphin-safe label to any tuna product harvested:

(1) Anywhere on the high seas by a vessel that uses driftnets, or (2) in the ETP, if there is no accompanying documentation, signed by the vessel captain, an observer, all exporters, all importers, and all processors, certifying that no purse seine nets were intentionally deployed on dolphins during the fishing trip on which the tuna were harvested.<sup>80</sup>

The net effect of the dolphin-safe policy and the DPCIA is a U.S. canned tuna market that is virtually dolphin-safe.<sup>81</sup>

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<sup>76</sup>*Id.*

<sup>77</sup>57 Fed. Reg. 27010, Table 1 (1992).

<sup>78</sup>16 U.S.C. 81385 (1992).

<sup>79</sup>16 U.S.C. 81385(d)(1) (1992).

<sup>80</sup>*Id.*; 56 Fed. Reg. 47418 (1991).

<sup>81</sup>56 Fed. Reg. 47418 (1991).

#### IV. MULTILATERAL EFFORTS TO PROTECT DOLPHINS IN THE ETP

##### A. Inter-American Tropical Tuna Commission (IATTC)

The IATTC was established in 1950 by a bilateral fishing agreement between the U.S. and Costa Rica.<sup>82</sup> Since its inception, the IATTC has been concerned primarily with the conservation and management of marine resources in the ETP.<sup>83</sup> Although little was accomplished during its first twenty years of existence, since the mid-1970's, the IATTC has taken a leading role in evaluating and reducing dolphin mortality in the ETP tuna fishery.

In 1976, the IATTC established the following goals to balance the competing interests of the tuna industry and dolphin conservationists:

(1) strive to maintain a high level of tuna production [and] (2) strive to maintain porpoise stocks at or above levels that assure their survival in perpetuity, (3) with every reasonable effort being made to avoid needless or careless killing of porpoise.<sup>84</sup>

In furtherance of these goals, the IATTC implemented a voluntary observer program in 1979 to monitor the fishing practices and performance of the foreign fleets.<sup>85</sup> Dolphin mortality data collected by these observers is used by the ETP harvesting nations to show compliance with the comparability standards of the MMPA.<sup>86</sup> The data is also used to calculate annual dolphin mortality rates for each major species and stock of dolphin.<sup>87</sup> Since 1988,

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<sup>82</sup>Other member states include: Panama, Ecuador, Canada, Japan, France and Nicaragua. Mexico and Costa Rica have withdrawn from the organization. K. Holland, *supra* note 8.

<sup>83</sup>*Id.*

<sup>84</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>85</sup>54 Fed. Reg. 20171 (1989).

<sup>86</sup>56 Fed. Reg. 47418 (1991); 53 Fed. Reg. 8910 (1988).

<sup>87</sup>54 Fed. Reg. 20171 (1989).

all the ETP harvesting nations with sizeable purse seine fleets have voluntarily participated in the program.<sup>88</sup> Observer coverage was initially set at 33 percent, but in January 1991, the ETP harvesting nations committed to 100 percent coverage.<sup>89</sup>

To compliment the observer program, the IATTC issued regulations in 1987 to manage purse seine fishing in the ETP.<sup>90</sup> These regulations were refined in 1991 to implement a new goal of reducing dolphin mortality to levels approaching zero.<sup>91</sup> To achieve this new goal, an aggressive research program was implemented to identify "alternative fishing methods that would not involve the encirclement of dolphins ...."<sup>92</sup> The member states also agreed to implement a dolphin conservation plan beginning in 1992.<sup>93</sup> The combined effect of these initiatives has been an 80 percent reduction in dolphin mortality by the foreign fleet from 133,000 animals in 1986 to 25,000 in 1991.<sup>94</sup>

#### B. IATTC Agreement of June 1992

The most significant contribution by the IATTC occurred in April 1992. At a special meeting held in La Jolla, California, the IATTC successfully

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<sup>88</sup>These states included: Ecuador, El Salvador, Mexico, Panama, the U.S., Vanuatu and Venezuela. *Id.*

<sup>89</sup>57 Fed. Reg. 47620 (1992).

<sup>90</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>91</sup>57 Fed. Reg. 47620 (1992).

<sup>92</sup>*Id.*

<sup>93</sup>*Id.*

<sup>94</sup>J. Brooke, *supra* note 8; 57 Fed. Reg. 27010 (1992).

negotiated the first ever multilateral agreement to protect dolphins in the ETP.<sup>95</sup> The agreement, formally ratified in June, provides for an 80 percent reduction in dolphin mortality between 1993 and 1999.<sup>96</sup> These reductions will be implemented through a system of individual vessel quotas based on the total number of purse seiners in the fishery and the following annual limits on total dolphin mortality:

Year	Limit	Percentage of best estimate of current populations of spotted, spinner, and common dolphins
1993	19,500	0.30
1994	15,500	0.24
1995	12,000	0.19
1996	9,000	0.14
1997	7,500	0.11
1998	6,500	0.10
1999	<5,000	<0.08

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Additional protections are afforded for individual species and stocks of dolphins in Appendix III of the agreement.

A Review Panel established by the agreement will be responsible for assigning individual vessel DMLs. The Panel will additionally review and report annually "on the compliance of the international fleet with the mortality limits" set out in the agreement.<sup>98</sup> Compliance will also be

<sup>95</sup>J. Brooke, *supra* note 8.

<sup>96</sup>*Id.* The parties to the agreement are: Columbia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Spain, the U.S., Vanuatu, and Venezuela. Inter-American Tropical Tuna Commission Agreement, Jun 92, at app. I.

<sup>97</sup>For example, if there are 100 purse seine vessels fishing in the ETP in 1993, each vessel would be assigned a "dolphin mortality limit" (DML) of 195 animals. An onboard IATTC observer will be responsible for informing the captain when his vessel has reached its DML. If a captain deliberately exceeds his quota, he is subject to a fine and/or license suspension. Additionally, the vessel's quota for subsequent years would be lowered accordingly. IATTC Agreement, *supra* note 96; J. Brooke, *supra* note 8.

<sup>98</sup>IATTC Agreement, *supra* note 96, at app. II.

monitored by 100 percent observer coverage, 50 percent of which must be provided by the IATTC.<sup>99</sup>

The agreement also establishes a full-time Scientific Advisory Board that will be responsible for coordinating an international research program.<sup>100</sup> The research program will initially focus on improving current purse-seine technology in order to reduce its potential of causing dolphin mortality.<sup>101</sup> The program will also seek alternative methods of harvesting tuna that do not involve the encirclement of dolphins.<sup>102</sup> Funding will be the major obstacle for the research program, although the U.S., Mexico, Venezuela, and the Italian Cannery Association have already pledged contributions of \$1.2, \$1.0, \$.5, and \$.4 million respectively, to initiate research in 1993.<sup>103</sup>

## V. INCREASED PROTECTION FOR DOLPHINS UNDER THE IDCA

In 1992, Congress revived its efforts to resolve the issue of incidental dolphin mortality in the ETF. While the Administration was negotiating the IATTC Agreement, Congress was busy developing an alternative plan to eliminate, vice reduce, dolphin mortality. The concept that emerged was a

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<sup>99</sup>*Id.*

<sup>100</sup>*Id.* at app. IV.

<sup>101</sup>*Id.*

<sup>102</sup>*Id.* Some proposals in this regard include: "separating tunas and dolphins prior to encirclement using acoustic stimuli, prey, or other stimuli; ... using paired-trawls to capture tunas associated with dolphin without encirclement; ... tracking and other behavioral studies of tunas and dolphins; ... locating large yellowfin tuna with [Fish Aggregation Devices] FADs, light detecting and ranging devices (LIDAR) or other optical sensors, and aggregating tunas with bait; [and] ... predicting the spatial distribution and catchability of large yellowfin tuna with oceanographic data." 57 Fed. Reg. 21081 (1992).

<sup>103</sup>57 Fed. Reg. 21081 (1992).

moratorium on the use of purse seine nets to intentionally encircle dolphins. The issue came to a head in July 1992 when legislation was introduced in the Senate to implement the IATTC Agreement.<sup>104</sup> Opponents of the bill simultaneously introduced the IDCA as an alternative solution arguing that the IATTC Agreement was unacceptable to the American people because it allowed for the deaths of an additional 75,000 dolphins by the year 2000.<sup>105</sup> They additionally argued that the continued use of purse seine nets was inimical to the original MMPA goal of reducing dolphin mortality to levels approaching zero.<sup>106</sup> The result was an overwhelming rejection of the IATTC Agreement in favor of the more rigid moratorium scheme of the IDCA.<sup>107</sup>

On October 26, 1992, the IDCA became the latest in a long line of unilateral U.S. efforts to protect dolphins in the ETP. It differs, however, from previous efforts in that it changes U.S. policy from one of "reducing" incidental dolphin mortality to one of "eliminating" such mortality. To achieve this change in policy, the Act amends the MMPA by adding a new Title III which authorizes the Secretary of State to enter into agreements to establish a 5-year moratorium on the use of purse seine nets (except for research purposes) to intentionally encircle dolphins in the tuna fisheries.<sup>108</sup> As an incentive for compliance, the IDCA provides that the

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<sup>104</sup>S. 2995, 102d Cong., 2d Sess. (1992).

<sup>105</sup>138 Cong. Rec. H9064-02, H9067 (1992).

<sup>106</sup>*Id.*; 138 Cong. Rec. S10135 (1992).

<sup>107</sup>The IDCA passed by a vote of 389 to 15 in the House of Representatives. 138 Cong. Rec. H9365-03 (1992).

<sup>108</sup>Pub. L. No. 102-523 §302(a). The required terms for any agreement entered into pursuant to §302(a) are set out in §302(b)(1)-(5) [general terms]; §303(a) [research program]; §303(b) [limits on dolphin mortality under research program]; and §303(c) [funding for research program]. In addition to the moratorium, the Act



U.S. will immediately lift any tuna embargo currently in effect for any nation that agrees to observe the moratorium.<sup>109</sup> To take advantage of this provision, however, a foreign state must commit in writing to: (1) implement the moratorium by March 1, 1994; (2) allow observers onboard its purse seiners (50% of which must be from a competent regional organization like the IATTC); (3) reduce its 1992 level of dolphin mortality "to a level that is lower than such mortality in 1991 by a statistically significant margin;" and (4) reduce its January 1993 to February 1994 level of dolphin mortality "to a level that is lower than such mortality in 1992 by a statistically significant margin."<sup>110</sup> If a state agrees to abide by the moratorium but subsequently fails to comply with its commitments under §305(a), the IDCA requires the Secretary of the Treasury to re-impose a tuna embargo against that nation.<sup>111</sup> The noncomplying state then has 60 days to certify and provide reasonable proof that it has fully implemented its prior commitment to comply with §305(a).<sup>112</sup> If the required evidence is not provided within 60 days, an additional embargo against other fish and fish products will be imposed.<sup>113</sup>

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also establishes a dolphin-safe tuna market in the U.S. by June 1994, provides for a research program, and reauthorizes the South Pacific Tuna Act which implements "the treaty which assures access for U.S. vessels to productive" tuna fisheries in the WTP through the year 2002. 103 Cong. Rec. H9064-02 (1992); Pub. L. No. 102-523 §§ 302, 304, 307 (1992).

<sup>109</sup>Pub. L. No. 102-523, §305(a) (1992).

<sup>110</sup>*Id.*

<sup>111</sup>*Id.*, at §305(b)(1).

<sup>112</sup>*Id.*, at §305(b)(2).

<sup>113</sup>This embargo is limited to fish and fish products which have "an aggregate customs valuation equal to 40 percent of the aggregate customs valuation ..." of all fish and fish products imported from that country during the base year. *Id.*

If an agreement to abide by the moratorium cannot be reached with any of the major purse seine fishing nations by March 1, 1994, U.S. purse seiners are permitted to continue fishing in the ETP until the end of 1999.<sup>114</sup>

However, the total number of dolphin mortalities caused by the U.S. fleet during this period must "continue to be reduced by statistically significant amounts each year to levels approaching zero."<sup>115</sup> This provision is significant because the embargoes under the MMPA are based, in part, on a foreign nations failure to achieve dolphin mortality rates comparable to U.S. standards.<sup>116</sup> As a result, it will become increasingly difficult for the foreign fleet to meet these comparability standards as U.S. dolphin mortality rates are phased down to zero by the end of 1999.

## VI. UNWARRANTED EXTENSION OF U.S. JURISDICTION

### A. Reasonableness Under the Restatement (Third) of the Foreign Relations Law of the United States

The assertion of extraterritorial jurisdiction under the IDCA is apparently based on the effects principle reflected in §402(1)(c) of the *Restatement*.<sup>117</sup> This principle, recognized in international law, allows a

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<sup>114</sup>*Id.*, at §306(a)(4).

<sup>115</sup>*Id.*

<sup>116</sup>16 U.S.C. §1371 (1992); 50 C.F.R. §216.24 (1991).

<sup>117</sup>Jurisdiction under the IDCA is derived from the MMPA which provides that:

(5) marine mammals and marine mammal products either--

(A) move in interstate commerce, or

(B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce, and that the protection and conservation of marine mammals is therefore necessary to insure the continuing availability of these

state to exercise jurisdiction over conduct occurring outside its territory when the effect or intended effect of such conduct within the state is substantial.<sup>118</sup> However, even though a basis for jurisdiction may exist under §402, a state is precluded from exercising jurisdiction over "a person or activity having connections with another state ..." if it would be unreasonable to do so.<sup>119</sup> Whether an exercise of extraterritorial jurisdiction is reasonable is determined by evaluating all relevant factors, including the factors listed in §403(2) of the *Restatement*.<sup>120</sup> As will be demonstrated below, an evaluation of those factors reflects that the IDCA is an unreasonable extension of U.S. jurisdiction. Any interest the U.S. may have in regulating dolphin mortality outside the U.S. EEZ is clearly outweighed by the adverse effects such regulations will have on the international community.

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products which move in interstate commerce; and

(6) marine mammals have proven themselves to be resources of great international significance, esthetics and recreational as well as economic, and it is the sense of Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. ...

16 U.S.C. §1361 (1992).

<sup>118</sup>RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §402(1)(c) (1986).

<sup>119</sup>*Id.*, at §403(1).

<sup>120</sup>*Id.*, at §403(1).

## 1. Link Between Purse Seine Fishing and the U.S.<sup>121</sup>

Reasonableness under the *Restatement* initially turns on the extent to which the activity to be regulated occurs "within", or has a direct and substantial effect "upon", the regulating state.<sup>122</sup> Since the great majority of purse seine fishing occurs "outside" the U.S. EEZ, the extraterritorial application of the IDCA will only be reasonable under §403(2)(a) if purse seining has a direct and substantial effect "upon" the U.S. There are arguably two bases under which the U.S. can claim that purse seine fishing has an effect "upon" the U.S. Neither of these bases, however, satisfy the "substantial and direct effect" requirement of §402 or §403 of the *Restatement*.

As the largest canned tuna market in the world, the U.S. may argue that it has a substantial interest in maintaining a dolphin-safe tuna market for American consumers.<sup>123</sup> The IDCA is necessary to achieve this goal because more than one-third of all canned tuna consumed in the U.S. is imported.<sup>124</sup> The trouble with this argument is that this interest can be achieved without implementing the IDCA. Dolphin-unsafe tuna is already effectively precluded from sale in the U.S. by the dolphin-safe policy and the DFCA labelling

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<sup>121</sup>The first factor to consider is "the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory." *Id.*, at §403(2)(a).

<sup>122</sup>*Id.*

<sup>123</sup>5 S. INT'L TRADE COMM. N. PDB 2547, *supra* note 2.

<sup>124</sup>*Id.*

provisions.<sup>125</sup> Therefore, the IDCA is unnecessary and cannot be justified on this basis.

Secondly, Congress has indicated that "marine mammals play an important role in the marine ecosystem and that they are significant recreational and esthetics resources ..." for the U.S.<sup>126</sup> Since dolphins are highly migratory species that move freely between the various EEZs encompassed by the ETP, this interest could be affected if substantial depletions of dolphin stocks occur outside the U.S. EEZ. Therefore, the U.S. arguably has an interest in maintaining an "optimum sustainable population" of dolphins in the ETP.<sup>127</sup> The difficulty with this argument, however, is that current scientific evidence does not support the conclusion that dolphin stocks or species are currently endangered or threatened in the ETP. On the contrary, scientific studies indicate that dolphin stocks and species in the ETP are healthy and can sustain the current level of incidental mortality in perpetuity.<sup>128</sup> These scientific findings become even more significant when the reductions in dolphin mortality required by IATTC Agreement are taken into consideration. Hence, the IDCA cannot be supported on this basis.

It appears therefore that the continued use of purse seine nets proscribed by the IDCA does not have a "substantial and direct" effect "upon" the U.S. Consequently, it would be unreasonable to extend the IDCA extraterritorially based on this factor alone. Moreover, since the U.S.

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<sup>125</sup>See note 81.

<sup>126</sup>134 Cong. Rec. S16336, S16342 (1988). See also 16 U.S.C. §1361(6) (1992).

<sup>127</sup>See note 43 for a definition of "optimum sustainable population".

<sup>128</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2; 55 Fed. Reg. 11921 (1990). These studies will be discussed in more detail in the §403(2)(c) analysis.

cannot demonstrate that purse seine fishing will have a "substantial effect" within its territory, the U.S. fails to satisfy the basic requirement for jurisdiction under the effects doctrine. As a result, any extraterritorial extension of the IDCA would not only be unreasonable, but would also have no basis under customary international law. However, even if the IDCA can overcome this initial obstacle, an evaluation of the remaining seven factors clearly demonstrates the unreasonableness of extending the law beyond the U.S. EEZ.

## 2. The Connection Between the Purse Seine Fleet and the U.S.<sup>129</sup>

Although once dominant in the ETF, the size of the U.S. purse seine fleet has declined significantly since the enactment of the 1981 amendments to the MMPA.<sup>130</sup> The dolphin-safe policy and the DPCIA have likewise had an impact on further reducing U.S. participation in the ETF tuna fishery.<sup>131</sup> Under the IDCA, even if the proposed moratorium does not take effect, the remaining seven U.S. purse seiners will be forced out of the ETF by 1999.<sup>132</sup>

Foreign presence, on the other hand, has grown appreciably since the 1980's. Whereas in 1971, there were only 13 foreign-flagged purse seiners

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<sup>129</sup>The second factor to consider is "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect." *RESTATEMENT (THIRD)*, *supra* note 118, at §403(2)(b).

<sup>130</sup>57 Fed. Reg. 47620 (1992).

<sup>131</sup>57 Fed. Reg. 27010, Table 1 (1992).

<sup>132</sup>Pub. L. No. 102-523, §306(a)(4) (1992).

operating in the ETP, by 1990 there were 90.<sup>133</sup> Over 80 percent of these vessels fly the Mexican or Venezuelan flag.<sup>134</sup>

Based on the level of participation alone, it is obvious that the foreign nations that maintain a significant presence in the ETP, not the U.S., have a greater interest in regulating fishing activities in the tuna fishery. The continued assertion of U.S. jurisdiction over foreign fishing practices in the ETP, despite a conscious decision by the U.S. to abandon the region, is clearly unreasonable and seriously impinges on the sovereignty of the ETP harvesting nations to regulate their respective tuna fleets.

### 3. Importance and Acceptability of the IDCA<sup>135</sup>

The next question that must be addressed under the *Restatement's* test is whether the international community will accept the level of importance that the U.S. has placed on the elimination of dolphin mortality in the ETP.

Since 1972, one of the primary goals of the MMFA has been to reduce dolphin mortality in the purse seine fisheries to levels approaching zero in order to maintain the overall viability of the dolphin populations.<sup>136</sup> The proponents of the IDCA argue that this goal cannot be achieved unless a

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<sup>133</sup>57 Fed. Reg. 27010, Table 1 (1992).

<sup>134</sup>Countries currently fishing in the ETP include: Ecuador, Costa Rica, France, Japan, Nicaragua, Mexico, Panama, Spain, the U.S., Venezuela, and Vanuatu. Only the U.S., Panama, Mexico and Venezuela continue to use purse seine nets to intentionally encircle dolphins. Mexico maintains over 50 purse seine boats; Venezuela maintains over 25. U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2, at n.90; 54 Fed. Reg. 20171, Table 1 (1989).

<sup>135</sup>The third factor to consider is "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted." RESTATEMENT (THIRD), *supra* note 118, at §403(2)(c).

<sup>136</sup>16 U.S.C. §1371(a) (1992).

moratorium on the use of purse seine nets to intentionally encircle dolphins is implemented.<sup>137</sup> They additionally argue that the continued killing of dolphins in the ETP is unacceptable to the American people.<sup>138</sup> Thus, in the opinion of Congress, the IDCA is necessary to ensure the viability of dolphin stocks in the ETP and to allay the concerns of the American people that dolphins are being slaughtered in the ETP.<sup>139</sup> However, based on available scientific evidence and National Marine Fishery Service (NMFS)/IATTC observer data, the importance placed on the elimination of dolphin mortality by the U.S. is simply untenable. Moreover, it completely ignores the social and economic impact the elimination of purse seine fishing will have on lesser developed countries like Mexico and Venezuela. It is not surprising, then, that the U.S. position is not supported by most of the ETP harvesting nations.

Although there is growing international support for enhanced dolphin protection, much of the international community disagrees with the manner in which the U.S. has attempted to impose its dolphin conservation standards on the rest of the world.<sup>140</sup> Mexico and Venezuela, in particular, have

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<sup>137</sup>138 Cong. Rec. S10135 (1992); 138 Cong. Rec. H9064-02, H9067 (1992).

<sup>138</sup>Pub. L. No. 102-523, §301(b)(1) (1992); 138 Cong. Rec. H9064-02, H9067 (1992).

<sup>139</sup>Note that the proponents of the IDCA additionally argued that, even if dolphin stocks are not endangered, the intentional encirclement of dolphins with purse seine nets should still be prohibited because such activities place the animals under stress. This argument was justified on the ground that dolphins are entitled to special protection because "human beings have always felt a special sense of kinship and wonder toward the dolphin, because of its beauty, its grace, and its proven intelligence." While laudable, there is no scientific evidence to support this view. 138 Cong. Rec. S10135, S10136 (1992); 138 Cong. Rec. H9064-02, H9068 (1992).

<sup>140</sup>In support of the U.S. position, the French Tuna Canners Association and two Italian tuna processors have indicated that they will not buy dolphin-unsafe tuna from the ETP. K. Conner, *supra* note 6. Additionally, the Fisheries Committee of the European Parliament passed a resolution in September 1991 recommending a ban on the importation of dolphin-unsafe tuna to the 12 member EC. E. Epstein, *Conservationists Bash Salinas' Dolphin Plan*, The San Francisco Chronicle, Sep. 27, 1991, at A14 (final ed.). Note, however, that the EC has filed a GATT complaint to challenge the secondary embargo provisions of the MMPA.



expressed their strong opposition to the IDCA. Government officials in both nations have publicly denounced the IDCA as an unilateral measure that impinges on their sovereignty and could have devastating effects on their economy and tuna industry.<sup>141</sup> Columbia and Vanuatu have also indicated that they will not support the IDCA for many of the same reasons.<sup>142</sup> In light of these statements and the recently concluded IATTC Agreement, it would appear that the ETP harvesting nations believe that the best way to guarantee the long-term sustainability of dolphin stocks is "not by the imposition of unilateral measures or embargoes ..." by the U.S., but rather through multilateral efforts at the IATTC.<sup>143</sup>

Opposition to the IDCA is not only based on sovereignty and economic/social concerns, but also on a number of scientific studies which found that a moratorium on purse seine fishing in the ETP would be unwise.<sup>144</sup> These studies suggest that dolphin mortality can be reduced to acceptable levels through a careful conservation program and the gradual development of new [fishing] methods ....<sup>145</sup> They further recommend that the best way to protect dolphins in the ETP is through better training of tuna

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Additionally, the majority of states subject to MHPA embargoes have not taken the necessary steps to have the import bans lifted.

<sup>141</sup>Venezuela: *Offensive on All Fronts Against U.S. Tuna Embargo*, Inter Press Service, Jan. 29, 1992; *Mexico Tuna Fishing Policy Defined*, Los Angeles Times, Nov. 22, 1992, at D5, col. 4 (home ed.).

<sup>142</sup>138 Cong. Rec. H9064-02, H9068 (1992). The fact that Vanuatu has not endorsed the IDCA is significant since it is the only nation subject to a primary MHPA embargo that has taken the steps necessary to have the import ban lifted.

<sup>143</sup>*Mexico Tuna Fishing Policy Defined*, *supra* note 141.

<sup>144</sup>These studies were conducted by the National Academy of Sciences, the National Research Council, and the IATTC. *Id.*; 138 Cong. Rec. H9064-02, H9068 (1992).

<sup>145</sup>*Mexico Tuna Fishing Policy Defined*, *supra* note 141.

boat captains and crews on dolphin-friendly fishing techniques.<sup>146</sup> Moreover, a four-year study released by the National Research Council in February 1992 indicated that "no practical alternative" to purse seine fishing exists to protect dolphins in the ETP.<sup>147</sup> This study additionally found that purse seine fishing was "the only commercially viable way of harvesting ..." large yellowfin tuna in the ETP.<sup>148</sup> The Council's report further supported the ETP harvesting nations' position that international cooperation is necessary if dolphin conservation efforts are to succeed and specifically recommended that the U.S. bring its "goals in line with the objectives of other nations, i.e., a reduction strategy as opposed to an elimination strategy."<sup>149</sup>

It appears therefore that the importance of eliminating dolphin mortality in the ETP is not shared by most of the ETP harvesting nations. Nor is the U.S. position supported by the overwhelming weight of scientific evidence which suggests that an absolute ban on purse seine fishing is unnecessary to protect dolphins in the tuna fisheries. Rather, this evidence suggests that the best way to protect dolphins in the ETP is through multilateral efforts. The unilateral extension of U.S. jurisdiction is therefore clearly unnecessary and unreasonable.

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<sup>146</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>147</sup>M. Parrish, *Study Says Ban on Nets Can't Save Dolphins*, Los Angeles Times, Feb. 28, 1992, at A1, col. 3 (Southland ed.).

<sup>148</sup>*Id.*

<sup>149</sup>*Id.*; U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2. Similar recommendations have been made by the NMFS and IATTC. 57 Fed. Reg. 21081 (1992); IATTC Agreement, *supra* note 96.

#### 4. Justified Expectations Protected or Hurt by the IDCA<sup>150</sup>

The IDCA restates preexisting expectations under the DPCIA and MMFA of achieving a dolphin-safe tuna market in the U.S and maintaining an optimum sustainable dolphin population in the ETP.<sup>151</sup> The legislative history also makes clear that the proponents of the IDCA expect that the new law will provide a solution to the current tuna ban disputes before the GATT.<sup>152</sup> The first two expectations have already been achieved under preexisting legislation. The latter cannot be achieved by imposing a moratorium on the use of purse seine nets. Consequently, further extraterritorial regulation in the ETP by the U.S. is unnecessary.

The distinct preference for dolphin-safe tuna by American consumers can be guaranteed by continued application of the dolphin-safe policy and DPCIA labelling requirements. Further unilateral regulations which force the U.S. standard on foreign consumers goes well beyond the expectation of achieving a dolphin-safe tuna market in the U.S. and is clearly unreasonable.

Similarly, the IDCA is not necessary to ensure the viability of dolphin stocks in the ETP. Based on the current number of dolphins in the ETP, scientists have concluded that the current levels of incidental mortality caused by the use of purse seine nets are sustainable by the ETP dolphin

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<sup>150</sup>The fourth factor to consider is "the existence of justified expectations that might be protected or hurt by the regulation." RESTATEMENT (THIRD), *supra* note 118, at §403(2)(d).

<sup>151</sup>Pub. L. No. 102-523, §301 (1992).

<sup>152</sup>138 Cong. Rec. H9064-02, H9071 (1992).

populations.<sup>153</sup> IATTC data collected in 1991 showed that incidental dolphin mortalities in the ETP were as follows:

Stock	Population abundance	Incidental mortality	Percent mortality
Northeastern spotted	738,100		
Western and/or southern spotted	1,299,300		
All spotted (except coastal)	2,037,400	13,991	.69
Eastern spinner	632,700	5,879	.93
Whitebelly spinner	1,020,100	2,974	.29
Northern common	477,000	161	.03
Central common	415,600	3,182	.77
Southern common	2,211,500	115	.01
Other dolphins	2,729,100	990	.04
All	9,523,400	27,292	.29154

These numbers are significant because scientific analysis has shown that incidental mortality rates below two percent do not jeopardize the recovery of the stocks.<sup>155</sup> It is evident from this data that dolphin populations in the ETP are not endangered by current purse seine fishing practices.<sup>156</sup>

<sup>153</sup>The National Academy of Sciences estimates the number of dolphins to be at 8 million. The IATTC puts the number at over 9.5 million. 138 Cong. Rec. H9064-02, H9068 (1992); IATTC Agreement, *supra* note 96, at app. III; U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>154</sup>IATTC Agreement, *supra* note 96, at app. III.

<sup>155</sup>*Id.*

<sup>156</sup>It should be noted that the NMFS determined in 1992 that the eastern spinner dolphin and northern offshore spotted dolphin were "depleted" as that term is defined in 16 U.S.C. 81362. 57 Fed. Reg. 27010 (1992); 57 Fed. Reg. 27207 (1992). However, neither stock was designated as a "threatened" species under the Endangered Species Act [16 U.S.C. 81532(2)]. 57 Fed. Reg. 47620 (1992). Moreover, scientific studies indicate that the population size of both stocks has been progressively increasing or has remained stable for the past 15 years. *Id.* Based on this evidence, the NMFS has concluded that "given the present abundance estimates and levels of take, that the population will remain viable in perpetuity." *Id.*

Additionally, since incidental dolphin mortalities will decline under the IATTC Agreement, dolphin stocks in the ETP will increase. This will further ensure the population's viability in perpetuity.<sup>157</sup>

Application of the moratorium could, on the other hand, increase dolphin mortality in the short-term. It could also affect the sustainability of tuna stocks worldwide.<sup>158</sup> Without question, the U.S. tuna fleet has the best fishing practices and the lowest dolphin mortality rate of any fleet currently operating in the ETP. The IDCA will, however, essentially force the remaining seven U.S. purse seiners out of business. As U.S. vessels withdraw from the fishery, foreign-flagged vessels, with higher dolphin mortality rates, will take their place. The result will be the incidental death of more dolphins over the short term until the IATTC Agreement takes full effect in 1999.<sup>159</sup> Therefore, rather than eliminating dolphin mortality, the IDCA will have the opposite effect of frustrating the MMPA's goal of reducing dolphin mortality in the ETP.

Of equal concern is the increasing number of tuna boats that are harvesting younger yellowfin tuna to avoid killing dolphins.<sup>160</sup> Because younger tuna rarely associate with dolphins, they may be harvested without intentionally setting nets on dolphins.<sup>161</sup> The problem is that the younger

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<sup>157</sup>57 Fed. Reg. 47620 (1992).

<sup>158</sup>Study: *No Practical Way to Ensure "Dolphin Safe" Tuna Fishing*, Journal of Commerce, Mar. 2, 1992, at A5, col. 5.

<sup>159</sup>The same argument has been made with regards to the DPCIA and dolphin-safe policy. S. Mydans, *Drive to Save Dolphins Jolts American Tuna Fleet*, The New York Times, May 10, 1990, at A1, col. 2 (late ed. - final); 2 *Tuna Cannors Shun Fishing That Snares Dolphins*, Chicago Tribune, Apr. 11, 1990, at C1 (North Sports final).

<sup>160</sup>J. Brooke, *supra* note 8.

<sup>161</sup>S. Mydans, *supra* note 159.

tuna are essential for replenishment of the stocks. If the immature tunas are over-fished, yellowfin tuna stocks in the ETP could be cut in half by the year 2000.<sup>162</sup> Similarly, tuna stocks in the WTP, where the tuna-dolphin bond does not occur, could also be threatened by over-fishing as ETP tuna boats are forced to migrate to the western Pacific to remain in business.<sup>163</sup> Since 1990, the number of U.S. tuna boats alone has increased in the WTP from 35 to 50.<sup>164</sup> This increased U.S. presence in the WTP is directly attributable to dolphin conservation legislation like the MMFA, DPCIA and IDCA, which make it financially unattractive for U.S. vessels to remain in the ETP. Thus, the IDCA could have the opposite effect of increasing dolphin mortality, as well as potentially endangering the sustainability of tuna stocks.

The IDCA will likewise fail to achieve U.S. expectations to resolve the current tuna ban disputes before the GATT. The IDCA can only resolve these disputes by lifting the MMFA embargoes. However, before the import bans can be lifted, the embargoed nations must agree to abide by the moratorium.<sup>165</sup> Yet both nations that have filed GATT complaints against the U.S. have indicated that they are unable and unwilling to abide by the moratorium. As a result, the MMFA embargoes and the GATT disputes will persist.<sup>166</sup>

It is clear, therefore, that the IDCA is unnecessary or will fail to achieve its desired results. Moreover, it completely ignores the needs and

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<sup>162</sup>J. Brooke, *supra* note 8.

<sup>163</sup>138 Cong. Rec. B2783-01 (1992).

<sup>164</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>165</sup>138 Cong. Rec. B9064-02, B9071 (1992).

<sup>166</sup>U.S. obligations under the GATT will be addressed further in the 547311 re: discussion.

expectations of the foreign tuna fleets to continue fishing in the ETP. Since the 1980's, both the U.S. and foreign tuna fleets have adopted new fishing techniques and equipment, at great expense, to substantially reduce dolphin mortality in the ETP.<sup>167</sup> Dolphin kills have been reduced from over 700,000 in 1960 to 27,000 in 1991.<sup>168</sup> Under the IATTC Agreement, incidental dolphin mortalities will be further reduced to less than 5,000 per year by 1999.<sup>169</sup> These accomplishments were not achieved by unilateral U.S. efforts, but rather by the combined efforts and cooperation of the U.S. and foreign tuna fleets. The IDCA's reward for this outstanding record of achievement and cooperation is to put the purse seine fleets out of business. Such a result is neither just nor reasonable.

##### 5. Importance of IDCA to the International Political, Legal, or Economic System<sup>170</sup>

Imposition of a moratorium in the ETP could also have a number of adverse economic, legal and political consequences for both the U.S. and the international community. For example, a moratorium on the use of purse seine nets could cause significant social and economic disruption for states like Mexico and Venezuela that rely heavily on the ETP as a food source and for jobs. Continued embargoes under the MMFA could derail U.S. and international efforts to renew the stalled GATT talks. Similarly, support in Congress for

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<sup>167</sup>U.S. Dept. of State Dispatch, *supra* note 57.

<sup>168</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>169</sup>See note 134.

<sup>170</sup>The next factor to consider is "the importance of the regulation to the international political, legal, or economic system." *RESTATEMENT (THIRD)*, *supra* note 116, at §403(1)(e).

the North American Free Trade Agreement (NAFTA) may not be forthcoming unless Mexico agrees to implement the IDCA moratorium. Finally, the unprecedented progress made by the IATTC to reduce dolphin mortality at the multilateral level could be impeded if U.S. unilateralism continues in the ETP. In short, what appears to be an isolated problem to the supporters of the IDCA, is, in fact, an issue that could potentially affect a broad range of international interests far removed from the ETP and far more important than the death of 75,000 dolphins over the next six years.

Economically, continued unilateral dolphin conservation efforts by the U.S. could have a devastating effect on the economies of several Latin American countries. The current embargoes under the MMPA have already had an adverse economic impact on several states, including Mexico and Venezuela.<sup>171</sup> Venezuela has suffered the most due to its historic reliance on the U.S. to purchase over 50 percent of its ETP yellowfin tuna catch.<sup>172</sup> This harvest has an estimated annual value of about \$14 million.<sup>173</sup> Mexico has also been affected, but not as severely. Having a strong European market, it is less dependent on the U.S. to purchase its ETP tuna harvest.<sup>174</sup> Before the tuna embargo was imposed, Mexico was exporting about \$10 million worth of yellowfin tuna to the U.S. annually.<sup>175</sup> However, if those nations subject

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<sup>171</sup>Other nations affected by the MMPA embargoes include: Ecuador, Cayman Islands, Panama, Spain and Vanuatu. Prior to the embargoes these nations were exporting over 60 percent of their combined ETP tuna harvest to the U.S. Ecuador alone was exporting over 25 percent of its total ETP yellowfin tuna catch to the U.S. 53 Fed. Reg. 8910 (1988).

<sup>172</sup>53 Fed. Reg. 8910 (1988).

<sup>173</sup>*Id.*

<sup>174</sup>*Id.*

<sup>175</sup>U.S. Dept. of State Dispatch, *supra* note 57.



to secondary embargoes decide to comply with the MMFA and ban Mexican tuna. Mexico could lose an additional \$57 million in tuna exports per year.<sup>176</sup>

In addition to the possibility of continued embargoes under the MMFA, the added import ban provisions of the IDCA could have a more devastating effect on the economies of the ETP harvesting nations. As previously discussed, if a nation fails to comply with its agreement to implement the moratorium, the IDCA provides for the imposition of additional sanctions including "a ban on the importation of all tuna products, a ban on at least 40 percent of all ... fish products and ... a total ban on fish products."<sup>177</sup> A total ban on all fish products is of particular concern to Mexico. Fishing is one of Mexico's top industries. It currently employs over 269,000 people and has developed into one of Mexico's top five foreign exchange earners.<sup>178</sup> In 1992, an estimated \$520 million in fish products were exported.<sup>179</sup> The majority of these products, with the exception of tuna, were exported to the U.S.<sup>180</sup> If an all-fish product embargo were imposed under the IDCA, Mexico could lose over \$360 million annually in foreign exchange.<sup>181</sup>

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<sup>176</sup>Venezuela would also be affected by such a decision since it is currently exporting about 50 percent of its ETP tuna harvest to Europe. *Id.*

<sup>177</sup>Pub. L. No. 102-523, §305(b)(2) (1992); 138 Cong. Rec. H9064-02, H9071 (1992); 138 Cong. Rec. S17840-05, S17841 (1992).

<sup>178</sup>*Mexico Takes a Lead in Fish Exports: Fishing Helps Exports, Nutrition & Jobs Creation*, Latin American Newsletters, Ltd. (1988), Latin American Commodities Report, Jun. 2, 1988, at 4.

<sup>179</sup>Robberson, *In Mexico, A Tempest Over Tuna*, The Washington Post, Jan. 8, 1993, at A12, col. 1.

<sup>180</sup>Latin American Newsletters, Ltd. (1988), Latin American Commodities Report, Jul. 15, 1988, at 15.

<sup>181</sup>Venezuela would lose about \$50 million annually under an all-fish ban. U.S. Dept. of State Dispatch, *supra* note 57.

The threat of embargo is not, however, the only economic concern Mexico and Venezuela have with the IDCA. There are other economic and social reasons that make compliance with the moratorium impossible for both nations. Mexico and Venezuela operate the two largest purse-seine fishing fleets in the ETP.<sup>182</sup> Implementation of a moratorium would effectively put these fleets out of business. The result would be heavy job losses and a severe reduction in the availability of much needed fish products for domestic consumption.<sup>183</sup>

Proponents of the IDCA suggest that Mexico and Venezuela can avoid these job and food source losses by transferring their purse seine fishing operations to the WTP where the tuna-dolphin bond is not a problem.<sup>184</sup> This suggestion presumes, however, that boat captains can afford to make the extensive and costly modifications necessary to fish in the WTP.<sup>185</sup> Such a transfer normally requires a vessel to refit "with a new mile-long net, a larger hydraulic system and power block assembly, and new sonars to detect the tuna."<sup>186</sup> In addition to these refitting costs, significantly greater expenses for fuel, repairs and transshipment fees are experienced by vessels operating in the WTP.<sup>187</sup> Moreover, even if a vessel can afford to refit,

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<sup>182</sup>54 Fed. Reg. 20171, Table 1 (1989).

<sup>183</sup>Arguably, the embargoes under the MNPA are the lesser of the two evils. *Mexico Backs Away From Fast on Tuna*, Los Angeles Times, Nov. 4, 1992.

<sup>184</sup>138 Cong. Rec. H9064-02, H9069 (1992).

<sup>185</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2. In Mexico, very high interest rates (180% in 1991) have restricted the ability of most fishermen to obtain loans to pay for these modifications. *Mexico - Fishing Equipment/Supplies*, National Trade Data Bank (1991), Market Reports, Jun. 11, 1991.

<sup>186</sup>S. Hydans, *supra* note 159.

<sup>187</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

it will not have guaranteed access to most of the abundant WTP tuna fisheries. Because the WTP is already overcrowded, many of the rich tuna fisheries are managed by the member nations of the South Pacific Forum Fisheries Agency pursuant to the South Pacific Tuna Treaty of 1987.<sup>188</sup>

A second alternative proposed for those vessels that cannot afford to refit is to fish on skipjack or immature yellowfin tuna in the ETP. This alternative, however, is also not a viable solution. First, because these tunas are smaller, they are more expensive to process.<sup>189</sup> Abroad, these added expenses place Latin American fishermen at a competitive disadvantage in the international tuna market. At home, these costs are ultimately passed on to domestic consumers in the form of higher prices. Secondly, as previously discussed, harvesting immature tuna could adversely affect the ability of the stocks to replenish themselves.<sup>190</sup> Based on the foregoing, compliance with the IIKA is simply not a viable economic option for states like Mexico and Venezuela operating large purse seine fleets in the ETP.

Extraterritorial application of U.S. dolphin conservation laws has also contributed to the difficult position in which the U.S. finds itself before the GATT. At a time when the international community appears ready to renew the stalled talks, the U.S. finds itself in the awkward position of having been found in violation of its GATT obligations. Although Mexico has decided not to submit the dispute panel ruling to the GATT Council for enforcement, continued adherence to that position is contingent on a successful resolution

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<sup>188</sup>U.S. participation is capped at 50 vessels. *Id.*

<sup>189</sup>*Id.*

<sup>190</sup>See note 162.

of the dispute with the U.S.<sup>191</sup> Additionally, the EC and Venezuela have indicated that they are prepared to go forward with their own complaints against the MMFA import bans if the U.S. does not cancel the embargoes or if Mexico fails to have the GATT panel's ruling adopted.<sup>192</sup> If these complaints go forward, it is almost certain that the GATT panel will rule against the U.S.<sup>193</sup> Such a result would place the U.S. in an even more difficult position before the GATT.<sup>194</sup> A resolution to this controversy must, therefore, be achieved if the U.S. is to improve its negotiating position at any subsequent talks.

The solution proposed by Congress is a lifting of the current tuna embargoes pursuant to §305 of the IDCA. Although it is true that a cancellation of the embargoes would resolve the GATT issue, the import ban can only be lifted under §305 if a foreign state agrees to observe the moratorium. However, both Mexico and Venezuela have indicated their opposition to a ban on the use of purse seine nets. Accordingly, the embargoes will not be lifted under the IDCA and the disputes will continue.

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<sup>191</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2. It has also been suggested that Mexico failed to have the GATT panel decision enforced so as not to jeopardize its chances of winning Congressional approval of the NAFTA. L. Stammer, *White House Urges End to Ban on Mexican Tuna*, Los Angeles Times, Mar. 5, 1992, at A3, col. 1 (home ed.).

<sup>192</sup>*Id.*; U.S. Dept. of State Dispatch, *supra* note 57. Twelve other GATT member states have joined in the move to have the GATT Council adopt the U.S.-Mexico dispute panel ruling. These members include: Argentina, Canada, India, Peru, Japan, Columbia, Senegal, South Korea, New Zealand, Pakistan, Brazil and Hong Kong. D. Ross, *Making GATT Dolphin-Safe: Trade and the Environment*, 2 DUKE J. COMP. & INT'L L. 345 (1992), at n.93. In addition, a number of states submitted third-party statements in support of the Mexican position during the hearings of the U.S.-Mexico dispute, including: Senegal, the Philippines, Thailand, Norway, Australia, Venezuela, Canada, the EC, Indonesia, Japan, and South Korea. *Id.*, at n.104.

<sup>193</sup>U.S. Dept. of State Dispatch, *supra* note 57.

<sup>194</sup>It has also been reported that the tuna-dolphin issue could complicate the acceptance of the NAFTA in both Mexico and the U.S. L. Stammer, *supra* note 191. A satisfactory solution to the tuna-dolphin issue is, therefore, important in both a domestic and an international context.

Moreover, the IDCA provides that, if no major purse seine fishing nation (i.e., Mexico and Venezuela) agrees to the moratorium, U.S. purse seiners can continue to operate in the ETP as long as the total dolphin mortality rates each year are "reduced by statistically significant amounts ...."<sup>195</sup> Under this provision, U.S. tuna boats will continue purse seining in the ETP until 1999 under a more ambiguous "comparability standard" than the one denounced by the U.S.-Mexico dispute panel.<sup>196</sup> In addition, the IDCA ignores the dispute panel's finding that U.S. jurisdiction to restrict products brought into the U.S. can not be applied extraterritorially to regulate production processes abroad.<sup>197</sup> It likewise ignores the panel's findings that the Article XX(b) and (g) exceptions can only be applied to protect domestic animals and resources within a state's jurisdiction. The IDCA is simply another attempt by the U.S. to use the environmental exceptions of the GATT to protect dolphins beyond the U.S. EEZ. Such an attempt will not survive a subsequent GATT challenge. The only sure solution to the tuna ban dispute is for the U.S. to immediately lift the MMFA embargoes and amend the IDCA to bring it into compliance with IATTC Agreement.

With regard to the international legal system, the U.S. has traditionally held itself out as a nation that observes the rule of law. One of the basic principles of international law is that nations have a duty to

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<sup>195</sup>Pub. L. No. 102-523, 306(a)(4) (1992).

<sup>196</sup>Under the MMPA, the maximum incidental dolphin mortality rate that a foreign nation must meet during any given period in order to export tuna to the U.S. is linked to actual U.S. mortality figures for the same period. The U.S.-Mexico dispute panel found this requirement to be too unpredictable, and hence inconsistent with GATT, Article XX(b) and (g), because the Mexicans would have no way of knowing whether they were in compliance with U.S. standards at any given point in time. T. Schoenbaum, *supra* note 67.

<sup>197</sup>J. Trachtman, *supra* note 59, at 150.

observe their treaty obligations.<sup>198</sup> The IDCA, however, violates this universally accepted tenet of customary international law. As enacted, the IDCA will violate preexisting U.S. treaty commitments under: (1) the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas; (2) the 1958 Geneva Convention on the High Seas; (3) the GATT; and (4) the IATTC Agreement.<sup>199</sup>

Under Article 1(1) of the Fishery Convention, all states enjoy a high seas freedom of fishing subject to three limitations: (1) their treaty obligations; (2) the rights of coastal states provided in Articles 6 and 7; and (3) the provisions of the convention dealing with conservation of resources.<sup>200</sup> With regard to coastal state rights and the conservation of living resources of the high seas, Article 4(1) of the Fishery Convention imposes a duty to negotiate multilateral conservation agreements on all states "engaged in fishing the same ... stocks of fish or other living marine resources in any area ... of the high seas ...." Under Article 6(1), however, coastal states are given a preferential status over other states with regard to "the maintenance of the productivity of the living resources in any area of

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<sup>198</sup>This principle is set out in the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27, (1969), 63 AMER. J. INT'L L. 875 (1969). Article 26 provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

<sup>199</sup>Thirty-eight states are parties to the Fishery Convention, including Mexico, Venezuela and the U.S. Sixty-two states are parties to the High Seas Convention, including Mexico, Venezuela and the U.S. NWP-9, *supra* note 33. U.S. violations of the GATT have been previously discussed and will not be discussed in this section. See note 19 for a list of parties to the IATTC Agreement which include Mexico, Venezuela and the U.S.

<sup>200</sup>Article 2 of the High Seas Convention contains a similar high seas freedom of fishing. The only limitation on this freedom is that it must be exercised with "reasonable regard to the interests of other States ...." Article 2 additionally prohibits any state from exercising sovereignty over any part of the high seas. Articles 4 and 5 of the Convention give the flag state jurisdiction over vessels that fly its flag. This implies that the flag state has jurisdiction to regulate fishing practices by its vessels on the high seas. The IDCA, to the extent that it attempts to regulate the fishing practices of the foreign tuna fleets, interferes with this high seas freedom and is therefore inconsistent with U.S. treaty obligations.

the high seas adjacent to its territorial sea." Any other state engaged in fishing in this area is required by Article 6(3) to "enter into negotiations with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area." If an agreement has not been reached within six months, the coastal state may enact unilateral conservation measures consistent with Article 7(1) and 7(2).<sup>201</sup> Additionally, once the coastal state has enacted conservation measures for the area of the high seas adjacent to its territorial sea, Article 7 provides that other states are prohibited from enforcing their own conservation measures in that area if those regulations are inconsistent with "those which have been adopted by the coastal State ...." Most states with coastlines bordering the ETP have enacted domestic legislation to regulate and improve the fishing practices of their purse seine fleets.<sup>202</sup> The IDCA moratorium is inconsistent with many of these regulations and is therefore in direct violation of Articles 6 and 7 of the Fishing Convention.

With regard to U.S. treaty obligations in the tuna fishery, 20<sup>th</sup> year ago, Congress charged the Secretary of State to negotiate a multilateral agreement with the ETP harvesting nations to protect dolphins taken incidentally in the

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<sup>201</sup>To be consistent with Article 7(2), the unilateral measures adopted must fulfill the following requirements:

- (a) That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery;
- (b) That the measures adopted are based on appropriate scientific findings;
- (c) That such measures do not discriminate in form or in fact against foreign fishermen.

<sup>202</sup>These states include Ecuador, Mexico, Panama, Vanuatu, Venezuela, Costa Rica, France, Guatemala and the Netherlands Antilles. 55 Fed. Reg. 11921 (1990); K. Holland, *supra* note 6, at n.68.

course of purse seine fishing operations.<sup>203</sup> That agreement was to provide for:

(i) cooperative research into alternative methods of locating and catching yellowfin tuna which do not involve the taking of marine mammals, (ii) cooperative research on the status of affected marine mammal population stocks, (iii) reliable monitoring of the number, rate, and species of marine mammals taken by vessels of harvesting nations, (iv) limitations on incidental take levels based upon the best scientific information available, and (v) the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable to reduce the incidental kill and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate ....<sup>204</sup>

All that and more was achieved in June 1992 when the ETP harvesting nations agreed to sign the IATTC Agreement. Without question, this agreement is the most significant accomplishment regarding dolphin conservation that has occurred at the international level in the last 50 years.<sup>205</sup> Four months later, however, this noteworthy achievement was placed in jeopardy with the passage of the IDCA. By enacting the IDCA, Congress ignored 20 years of negotiations that produced a solid conservation program that all the ETP harvesting nations, except the U.S., can accept. Moreover, to the extent that the IDCA moratorium interferes with a state's fishing rights by prohibiting incidental takes, it is inconsistent with U.S. obligations under the IATTC Agreement. Such action on the part of the U.S. is clearly unreasonable and provides little incentive for the ETP harvesting nations to engage in further discussions with the U.S. over the tuna-dolphin issue.

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<sup>203</sup>16 U.S.C. 1378(a)(2) (1992).

<sup>204</sup>*Id.*

<sup>205</sup>U.S. Dept. of State Dispatch, *supra* note 57.



From the foregoing, it is evident that implementation of the IDCA will have a number of adverse international economic, legal and political consequences. To the extent that these effects can be reduced or eliminated by adherence to the IATTC Agreement, the U.S. acts unreasonably in attempting to enforce its dolphin conservation laws unilaterally in the ETP.

#### 6. Consistency with the International System<sup>206</sup>

The extraterritorial application of the IDCA also conflicts with customary norms of international maritime law as reflected in the 1982 LOSC. Although the U.S. has not signed the LOSC, it has repeatedly recognized that the non-seabed portions of the Convention are reflective of customary international law.<sup>207</sup> Accordingly, the President indicated in 1983 that the U.S. would act in accordance with the non-seabed portions of the Convention and would "recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States ... under international law" were recognized by such coastal states.<sup>208</sup>

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<sup>206</sup>The next factor to consider is "the extent to which the regulation is consistent with the traditions of the international systems." RESTATEMENT (THIRD), *supra* note 118, at §403(2)(f).

<sup>207</sup>The LOSC was not signed "because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries ...." With regard to the non-seabed portions of the agreement, the U.S. stated that "the convention ... contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states." *Statement on United States Ocean Policy*, *supra* note 35. The LOSC has been signed by 119 states and has been ratified by more than 50 states. In accordance with Article 307 of the Convention, it will enter into force "12 months after the date of deposit of the sixtieth instrument of ratification or accession." Mexico has ratified the Convention. Panama is a signatory, but has not yet ratified. Venezuela joined the U.S. in not signing the Convention. NWP-9, *supra* note 33.

<sup>208</sup>*Id.*

The IDCA initially conflicts with the customary norm of flag-state sovereignty over ships that fly its flag.<sup>209</sup> With limited exceptions,<sup>210</sup> this principle grants the flag-state exclusive jurisdiction over all administrative, technical and social matters regarding ships that fly its flag.<sup>211</sup> The IDCA, however, interferes with a flag-state's right to regulate the fishing practices of its tuna fleet. It is therefore inconsistent with this customary international law principle.

The IDCA also conflicts with the universally recognized high seas freedom of fishing.<sup>212</sup> By dictating how a foreign state can fish in the ETZ (including parts of the high seas), the IDCA attempts to subject a part of the high seas to U.S. sovereignty. This is clearly in violation of customary international law as reflected in Articles 87 and 89 of the LOSC.<sup>213</sup>

Additionally, the IDCA conflicts with the customary law duty to cooperate in the management and conservation of marine resources in the high

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<sup>209</sup>Article 91(1) provides that "ships have the nationality of the State whose flag they are entitled to fly." Accord RESTATEMENT (THIRD), *supra* note 118, at §501.

<sup>210</sup>All states may exercise jurisdiction over ships engaged in piracy and slave trade regardless of the flag they are flying. See Articles 99 and 105 of the LOSC.

<sup>211</sup>LOSC, Articles 91 and 94(1). See also RESTATEMENT (THIRD), *supra* note 118.

<sup>212</sup>Article 87 of the LOSC provides that "the high seas are open to all States .... Freedom of the high seas ... comprises, *inter alia*, ... freedom of fishing .... These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas ...." The U.S. clearly takes advantage of this freedom of fishing since more than 94 percent of the tuna harvested by the U.S. is caught outside the U.S. EEZ. U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2. Accord RESTATEMENT (THIRD), *supra* note 118, at §521.

<sup>213</sup>Article 89 provides that "no State may validly purport to subject any part of the high seas to its sovereignty."

seas.<sup>214</sup> Such cooperation is particularly important when nationals from different states "exploit identical ... or different living resources in the same area ...."<sup>215</sup> Under such circumstances, Article 118 of the LOSC imposes a duty on states "to establish subregional or regional fisheries organizations ..." and to negotiate adequate conservation measures for the resources concerned. There is a similar duty to work through appropriate international organizations in order to conserve and manage marine mammals in the high seas.<sup>216</sup> This requirement for multilateral cooperation in the management and conservation of marine resources in the high seas is not a new concept and has been historically recognized by the U.S.<sup>217</sup> To the extent that the IDCA is a unilateral attempt by the U.S. to regulate dolphin conservation on the high seas, it is inconsistent with this customary duty to cooperate.

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<sup>214</sup>Article 117 of the LOSC provides that "all States have the duty ... to co-operate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."

<sup>215</sup>LOSC, Article 118.

<sup>216</sup>LOSC, Article 120.

<sup>217</sup>This duty to cooperate has been recognized by the U.S. in the Truman Fishery Proclamation, the MFCMA, the 1958 Fishery Convention, the MHPA, and the IATTC Agreement. For a concurring Soviet view, see G. Tunnin, *The Geneva Conference on the Law of the Sea*, 7 INT'L AFFAIRS 47-52 (Moscow) (1958).

Finally, the IDCA conflicts with the well-recognized, albeit recently established, concept of the EEZ reflected in Part V of the LOSC.<sup>218</sup> In the EEZ, a coastal state has *inter alia*:

(a) sovereign rights for the purpose of ... exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed ...; [and]

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: ... (iii) the protection and preservation of the marine environment; ...<sup>219</sup>

The coastal state shall exercise these rights and duties with due regard to the rights and duties of other States ...<sup>220</sup>

With regard to fish stocks that "occur within the exclusive economic zones of two or more coastal States," or "within the exclusive economic zone and in an area beyond and adjacent to the zone," Article 63 of the LOSC requires that the states involved negotiate, "either directly or through ... regional organizations," appropriate conservation measures for these stocks. This duty to negotiate is extended to stated that fish for highly migratory species, such as tuna, to ensure the "optimum utilization of such species ... both within and beyond the exclusive economic zone."<sup>221</sup> Additionally,

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<sup>218</sup>Today, more than 80 states, including Mexico, Venezuela and the U.S., claim a 200-mile EEZ. Another 25 states claim fishery zones, 21 of which extend 200 nautical miles from shore. Thirteen other states, including Panama, Ecuador, El Salvador, Nicaragua and Peru, claim 200-mile territorial seas. Such claims, in combination with the effects of the long negotiating history of, and overwhelming support for (i.e., 119 signatories), the LOSC, strongly support the position espoused by many commentators that the EEZ concept is reflective of customary international law as evidenced by state practice. NWP-9, *supra* note 33. The U.S. has officially taken the position that the EEZ concept "is widely regarded as lawful under customary international law" and that "there is already a considerable record of state practice supporting such a conclusion. See U.S. Dept. of State, Oceans Policy and the Exclusive Economic Zone, Mar. 10, 1983, Current Policy No. 471. The EEZ concept has also been endorsed by the American Law Institute in §511 of the RESTATEMENT (THIRD), *supra* at note 116.

<sup>219</sup>LOSC, Article 56(1).

<sup>220</sup>LOSC, Article 56(2).

<sup>221</sup>LOSC, Article 64.

Article 65 imposes a duty on all states to cooperate through appropriate international organizations to conserve marine mammals.

By attempting to regulate fishing practices in the EEZ of other states, the IDCA specifically violates the sovereign rights and duties of coastal states to exploit, manage and conserve the marine resources within their respective EEZs. Additionally, the unilateral nature of the IDCA clearly violates the duty to cooperate in the negotiation of conservation measures for the management and protection of highly migratory species (such as tuna and dolphin) under Article 64.

#### 7. Other States' Interests in the ETP<sup>222</sup>

The most compelling justification for foreign state regulation in the ETP, apart from sovereignty concerns and the aforementioned conventional and customary international law principles, is economic development. Tuna is the second most important commercial fish product in the world.<sup>223</sup> Since 1960, world tuna consumption has grown at a rate of seven percent per year, and in 1991, world tuna sales were estimated at over \$4.5 billion.<sup>224</sup> One quarter of this catch, primarily yellowfin tuna, was harvested in the ETP.<sup>225</sup> Therefore, the tuna industry is an attractive option for some of the lesser developed countries of Latin America to improve their economic status. Both Mexico and Venezuela have taken advantage of this option and are currently

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<sup>222</sup>The next factor to consider is "the extent to which another state may have an interest in regulating the activity." RESTATEMENT (THIRD), *supra* note 118, at §403(2)(g).

<sup>223</sup>O.S. INT'L TRADE COMM'N PDE No. 2547, *supra* note 2.

<sup>224</sup>*Id.*

<sup>225</sup>M. Parrish, *supra* note 147.

operating the two largest purse seine fleets in the ETP.<sup>226</sup> As a result, they both have a significant interest in regulating the fishing practices of their respective fleets. Moreover, for Mexico, compliance with the IDCA would mean a prohibition on tuna fishing throughout its entire EEZ, an area in which it is authorized by international law to exercise "sovereign rights for the purpose of ... exploiting, conserving and managing the natural resources ..." of the zone.<sup>227</sup> Mexico therefore obviously has a paramount interest in regulating its own fishing activities within the ETP.

In addition, the IDCA completely ignores the treaty obligations of other states under the IATTC Agreement.<sup>228</sup> These states have a duty under international law to adopt regulations to implement their obligations under the agreement. However, such regulations will undoubtedly conflict with the moratorium requirement of the IDCA. It is therefore unreasonable for the U.S. to expect foreign state compliance with the IDCA.

#### 8. Likelihood of Conflict<sup>229</sup>

Although Congress apparently believes that the U.S. has authority under international law to unilaterally apply its dolphin conservation policies extraterritorially, it would appear from the foregoing discussion that many of the ETP harvesting nations disagree. Conflict over the tuna-dolphin issue is

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<sup>226</sup>Mexico has over 50 purse seine vessels operating in the ETP; Venezuela has over 25 vessels. J. Brooke, *supra* note 8.

<sup>227</sup>Robberson, *supra* note 179; LOSC, Article 56(1).

<sup>228</sup>138 Cong. Rec. H9064-02, H9068 (1992).

<sup>229</sup>The final factor to consider is "the likelihood of conflict with regulation by another state." RESTATEMENT (THIRD), *supra* note 118, at 8403(2)(h).

therefore inevitable, particularly since most ETP harvesting states have enacted domestic legislation to protect dolphins and regulate their purse seine fleets.<sup>230</sup>

This potential for conflict with other states' regulations can be illustrated by the current embargo against Columbia. In 1992, the NMFS reviewed Columbia's marine mammal regulatory program. It found that the program was comparable to the U.S. program. Additionally, IATTC observer reports indicated that there were no observed dolphin mortalities associated with the Colombian purse seine fleet during the 1991 fishing season. Despite these findings, an import ban was still imposed against Colombian yellowfin tuna. The justification given for the embargo was that "the level of observer coverage during the period was [only] 40 percent."<sup>231</sup> That figure was below the 100 percent required by NMFS regulations.<sup>232</sup>

The potential for conflict has become more apparent with the adoption of the IATTC Agreement. A recent incident involving Panama provides an example of how the potential for conflict has increased. In 1990, yellowfin tuna harvested by Panamanian purse seiners was embargoed under the MMFA. In order

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<sup>230</sup>Mexico announced its new 10-point dolphin conservation program in September 1991. L. Stammer, *supra* note 191. The Mexican program focuses on improving current fishing practices as opposed to a total ban on purse seine fishing. 57 Fed. Reg. 21081 (1992). Venezuela has also enacted tough dolphin conservation regulations that promise to reduce incidental mortality by 75 percent. *Venezuela: Offensive on All Fronts Against U.S. Tuna Embargo*, *supra* note 141. Panama has recently amended its laws to comply with its obligations under the IATTC Agreement. This new law allows for the intentional encirclement of dolphins with purse seine nets. 58 Fed. Reg. 3013 (1993). Costa Rica, Columbia, Ecuador, France, Guatemala, Vanuatu and the Netherlands Antilles have also enacted conservation laws to protect dolphins in the purse seine fisheries. K. Holland, *supra* note 6, at n.68; 55 Fed. Reg. 11921 (1990); 57 Fed. Reg. 17857 (1992).

<sup>231</sup>Secondary embargoes will also be imposed against intermediary nations that do not provide the required certification that they have banned yellowfin tuna imports from Columbia. 57 Fed. Reg. 17857 (1992).

<sup>232</sup>57 Fed. Reg. 668 (1992); 57 Fed. Reg. 17857 (1992). Note that the original NMFS regulations only required 33 percent observer coverage.

to lift the embargo, Panama enacted a law- Presidential Decree No. 111- which prohibited the intentional encirclement of dolphins with purse seine nets. In January 1992, the embargo was lifted by the U.S. However, in order to comply with its obligations under the IATTC Agreement, Panama modified Presidential Decree No. 111 on October 20, 1992. The new law- Presidential Decree No. 70 allows "Panamanian purse seine vessels operating under the ... IATTC dolphin mortality program to intentionally deploy their nets on ... marine mammals." As a result of this change in the law and reports by observers that Panamanian vessels had used purse seine nets to intentionally encircle dolphins on two successive trips, an embargo was re-imposed against Panamanian yellowfin tuna in January 1993.<sup>233</sup>

Both of these cases graphically illustrate the reality of conflict between the IDCA and the dolphin conservation laws of other nations. In the first example, the U.S. imposed an import ban even though there was no evidence of dolphin mortality associated with the purse seine fleet. In the second example, the U.S. has penalized a nation for complying with its international obligations. Unquestionably, such results are unreasonable. This is clearly one of those situations in which the U.S. should limit the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states ....<sup>234</sup>

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<sup>233</sup>Secondary embargoes will also be imposed against intermediary nations that do not provide the required certification indicating that they have banned the import of yellowfin tuna from Panama. 56 Fed. Reg. 3013 (1993).

<sup>234</sup>The *Restatement* provides that "When regulation of transnational activity is based on its effects in the territory of the regulating state, the principle of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states, particularly with the state where the act takes place." *RESTATEMENT (THIRD)*, *supra* note 118, at §403, Reporters' Note 3.



## 9. Who Has the Greater Interest?

Even if a U.S. court were to reach the untenable conclusion that the IDCA is a reasonable application of extraterritorial jurisdiction under §403(2), the *Restatement* still requires the application of a balancing test to determine which state has the greatest interest in regulating fishing activities in the ETP.<sup>235</sup> On the one hand, the U.S. has an interest in saving 75,000 dolphins over the next six years and achieving a dolphin-safe tuna market in the U.S. On the other hand, ETP harvesting states have an interest in improving their economic and social status (through the continued use of purse seine nets to harvest tuna) and complying with their treaty obligations under the IATTC Agreement. Upon weighing those interests, it is obvious that the commercial, legal and political needs of the ETP harvesting nations are clearly paramount. Accordingly, the U.S. should defer to the greater interests of the ETP harvesting states in this instance.

## VII. SUMMARY: A Proposed Solution

The IDCA has been justified on the ground that "the past strategy of trying to reduce dolphin mortality while continuing to fish for tuna in association with dolphin is no longer sufficient."<sup>236</sup> In light of the overwhelming scientific evidence to the contrary and the economic and social

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<sup>235</sup>§403(3) of the *RESTATEMENT (THIRD)* provides:

When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

<sup>236</sup>138 Cong. Rec. S17840-05, 17841 (1992); 138 Cong. Rec. S10135, S10136 (1992).

needs of the ETP harvesting nations to continue purse seine fishing, such a position is untenable. The moratorium, in particular, is not based on scientific fact and is, hence, an unreasonable demand to place on nations that rely heavily on the ETP tuna fishery to enhance their economic and social well-being.<sup>237</sup> Moreover, the unilateral nature of the IDCA violates nearly every conventional and customary norm of maritime law with respect to fishery management and conservation, as well as U.S. treaty obligations under the GATT. The IDCA, therefore, does not provide an appropriate nor reasonable solution to the tuna-dolphin problem in the ETP. A proper balance between the U.S. interest in protecting dolphins and the ETP harvesting nations' interest in maintaining a viable tuna industry by fishing in the ETP can only be achieved through implementation of the IATTC Agreement and the DPCA dolphin safe regime.

Implementation of the IATTC Agreement will immediately eliminate any potential conflicts with the other nine states that have joined the agreement. Sovereignty concerns will be accommodated and claims of U.S. unilateralism will be precluded. In addition, implementation of the IATTC Agreement will bring the U.S. back into compliance with its obligations under the GATT. More importantly, compliance with the IATTC Agreement comports with the basic tenet of fishery management of highly migratory species- that is, multilateral

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<sup>237</sup>Note that the proponents of the IDCA acknowledge that "the overall viability of dolphin populations are not endangered ..." by the use of purse seine nets and that safeguards "currently in place guarantee that this will continue to be the case." 138 Cong. Rec. S10135, S10136 (1992); 138 Cong. Rec. H9064-02, H9068 (1992).

cooperation throughout the range of the stock. Without such cooperation, any effort to manage and conserve highly migratory species will fail.<sup>238</sup>

Implementation of the DPCIA regime allows the American consumer to decide if the U.S. tuna market should be dolphin-safe.<sup>239</sup> It is a proven regime that has already resulted in an U.S. tuna market that is virtually dolphin-safe.<sup>240</sup> It has additionally encouraged research into alternative means of harvesting tuna that do not involve the intentional setting on dolphins.<sup>241</sup> In the end, it will be the buying power of the American consumer, and not unilateral measures by Congress, that will have the greatest impact on the foreign purse seine fleets.<sup>242</sup> In the meantime, the IATTC Agreement promises to significantly reduce dolphin mortality to levels approaching zero by the year 1999 and will guarantee the viability of dolphin populations in perpetuity.

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<sup>238</sup>This theme was also emphasized by a National Academy of Sciences study. The report found "that the best way for the United States to address the tuna/dolphin issue was to work cooperatively with the other fishing nations of the region to reduce the incidental take of dolphins." G. Randy, *Congress Nulls Fishing Ban*, San Diego Daily Transcript, Jul. 22, 1992, at A1.

<sup>239</sup>Recall that the DPCIA labelling provisions were reviewed by the U.S.-Mexico dispute panel and were found to be consistent with the GATT. See note 67.

<sup>240</sup>Even Greenpeace has indicated that the processors' dolphin-safe policy is "the biggest steps that could be taken in order to preserve dolphins in the ETP in ... the last 20 to 30 years." 2 *Tuna Canners Shun Fishing That Snares Dolphins*, *supra* note 159.

<sup>241</sup>U.S. INT'L TRADE COMM'N PUB. No. 2547, *supra* note 2.

<sup>242</sup>138 Cong. Rec. S10135, S10136 (1992).